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CITY UNIVERSITY
London

The Legality of the Use of Force against Iraq in 2003

Being a Thesis submitted in fulfilment of

The requirements for

The Degree of Doctor of Philosophy

The City Law School

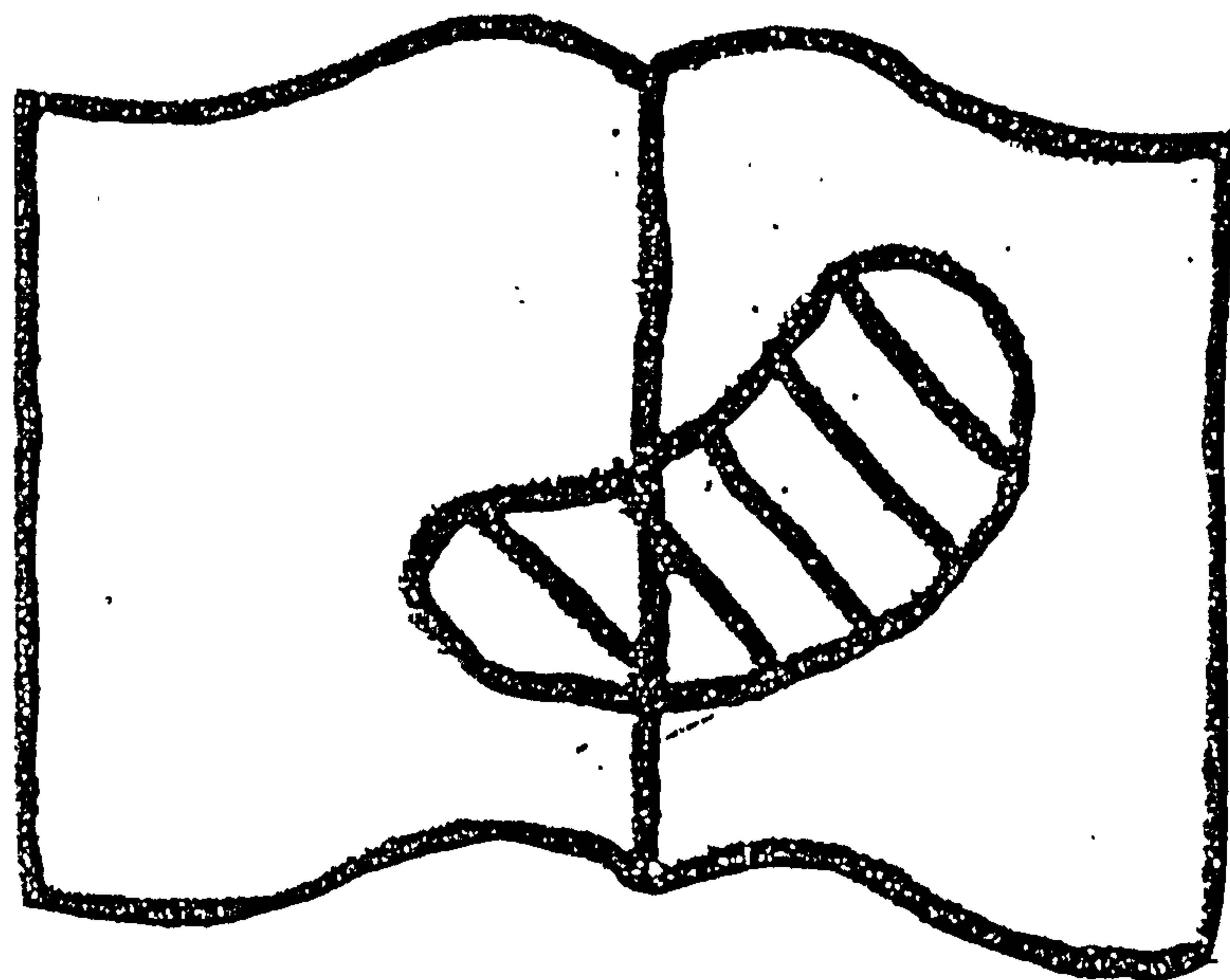
By

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Abstract

The object of this thesis is to assess the legality of the use of force against Iraq in 2003. To do so, the study examines the validity of the justifications put forward by the US and the UK for their action in light of the existing regulations on the use of force. These justifications are as follows: i) the Security Council authorization for the use of force; ii) the right of self-defence in pre-emptive action against threats from Iraq; iii) the right of pro-democratic intervention in Iraq in order to relieve the Iraqi people of vast and continuing human rights violations by the despotic regime of Saddam Hussein.

The thesis begins with an introduction which indicates the scope of the study, the approach adopted and the outline of the thesis. The opening chapter reviews the regulation of the use of force under the UN Charter. The second chapter examines the Iran-Iraq war 1980-1988. The third chapter analyses the Kuwait crisis and its sequels. Chapter Four interprets Resolution 678 according to the rules of interpretation in order to determine whether the mandate of that resolution was extinguished after Iraq had been expelled from Kuwait, or still governed the situation in 2003. Chapter Five investigates the rules governing armistice agreements in order to explore whether the coalition forces had the right to terminate the cease-fire and resume hostilities, without new authorization of force, on grounds of Iraq's violations of the conditions established in the cease-fire Resolution 687. The sixth chapter scrutinizes the legality of the disarmament sanctions imposed upon Iraq in Resolution 687 and Iraq's right to defy the implementation of these measures, should their imposition be proved to be an *ultra vires* act by the Security Council. Chapter Seven examines the validity of the argument that the invasion was a pre-emptive self-defence against threats from Iraq. Chapter Eight inspects whether the invasion can be characterized and justified as a 'pro-democratic' war. Finally, the conclusion summarises the findings of the research.

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Dedication

This doctoral thesis is dedicated to my mother (Dr. S. Mehani), who made it possible, through her constant encouragement and invaluable moral and financial assistance, for me to pursue my academic studies.

Acknowledgments

Writing a doctoral thesis may well be a solitary task, but it is rarely completed alone. I have many people to thank.

My sincere thanks and gratitude are due to my supervisor, Dr. Omer El-Agab, whose whole-hearted assistance and support contributed enormously to the completion of this thesis.

I am also very much indebted to Professor Christopher Ryan; Professor Mike Purdue; Professor Peter Kunzlik; Professor Ian Loveland; Mrs. Joan Small for their unreserved help and support.

I would like also to express my gratitude for the sacrifices made by my wife and children, without whose love and patience, this thesis would never have been completed.

Abbreviations

AFRC	Armed Forces Revolutionary Committee
AJIL	American Journal of International Law
BYIL	British Year Book of International Law
Cornell LJ	Cornell Law Journal
CSCE	Conference on Security and Cooperation in Europe
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
Harvard ILJ	Harvard International Law Journal
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IFDA Dossier	International Foundation for Development Alternatives
ILC	International Law Commission
ILM	International Law Materiel
INC	Iraqi National Congress
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
ONUC	United Nations Operation in the Congo
PCIJ	Permanent Court of International Justice
PDF	Panamanian Defence Force
SCOR	Security Council Official Records

UNCIO	Documents of the United Nations Conference on International Organization
UNDPI	United Nations Department of Public Information
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNSCOM	United Nations Special Commission
UNYB	United Nations Yearbook
Yale JIL	Yale Journal of International Law

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Introduction

A. Purpose

The use of force against Iraq in March 2003 by the US and the UK was extremely controversial and its legality was challenged by some States including close NATO allies such as France and Germany. In the legal literature, commentators are severely divided between dissentients and advocates whose opposing positions have become well-entrenched in the last four years. Dissentients consider the 2003 invasion a flagrant violation of the UN Charter; some went as far as describing the action as a Crime Against Peace in the Nuremberg sense and a sign of the collapse of the UN system. On the other hand, advocates viewed *Operation Iraqi Freedom* as a defining moment for international law and a vindication of the authority of the United Nations. This thesis is concerned with the legality of the use of force against Iraq in 2003. The key question to be considered is whether the use of force against Iraq in March 2003 was consistent with the framework of the use of force under the UN Charter and the contemporary customary rules or whether it was in infringement of international norms. Although this topic has been discussed frequently since the invasion, however, no comprehensive study of all the legal aspects of this conflict or detailed account of the justifications put forward by the US and the UK for their action has been undertaken.

B. Scope

One of the perplexing issues regarding the 2003 action is its outcomes vis-à-vis the purposes stated by the US and the UK for the invasion. The invading powers claimed that the objectives of the war, among others, were to find and destroy Iraq's weapons of mass destruction and to relieve Iraqis from the continuous violations of human rights by Saddam Hussein's vicious regime. However, at the time of concluding this study, no weapons of mass destruction have yet

been discovered and violence on a massive scale, which can fairly be described as a civil war, has broken out between different sects of the Iraqi population, mainly the Sunnis and Shiites, since Saddam's regime was toppled. Although these ex post developments have intensified the case against the war, however, they do not directly bear on the justification for the use of force ex ante. What is important for *jus ad bellum* purposes is the facts that existed at the time the hostilities were commenced, not what transpired afterwards. Accordingly, this study will be confined to the facts that existed in March 2003 and will not take into account the consequences that unfolded after the invasion.

C. Approach

The main concern of the present study is to assess the validity of the justifications put forward by the US and the UK for the invasion in light of the contemporary regulations on the use of force. These justifications are as follows: i) the Security Council authorization for the use of force; ii) the right of self-defence in pre-emptive action against threats from Iraq; iii) the right of pro-democratic intervention in Iraq in order to relieve the Iraqi people of vast and continuing human rights violations by the despotic regime of Saddam Hussein.

In testing the legal validity of these justifications it has been essential to address in detail some doctrines of the use of force, such as the concept of anticipatory self-defence and the new doctrine of "preventive self-defence" or what is known as the "Bush Doctrine", the use of force against non-State actors and States that support and harbour terrorists, and the humanitarian doctrine of pro-democratic intervention. Deep analysis will be carried out, throughout the thesis, of the pertinent State practice, doctrinal views, statements by States' Representatives in the Security Council, and jurisprudence. Nevertheless, it has been deemed essential to dedicate the first chapter of the thesis to an overview of the Charter regulations on the use of force and their

travaux préparatoires, in an attempt to determine the drafters' true intentions regarding some controversial issues which have appeared in practice.

It should be noted that, whilst the main area of research is the rules governing *jus ad bellum*, the topic under discussion prerequisites investigating other areas of international law such as the rules of treaty interpretation, the law of international organizations, the doctrine of estoppel and the rules of *ius in bello*. These subjects will be examined throughout the thesis in connection with the relevant context.

It has also been essential to highlight the background and attitude of Saddam Hussein's regime and its record of violence and violation of international norms which led to the deterioration of its reputation among the international community and was the *raison d'être* behind the decision to topple this regime in 2003. From this perspective, it has been deemed appropriate to dedicate the second Chapter to a brief examination of the Iran-Iraq War 1980-1988, in order to demonstrate the effects and developments set in motion by this war, long before the Kuwait crisis and its consequences which led to the 2003 invasion and the overthrow of the Iraqi government.

D. Outline of the thesis

The thesis is composed of eight chapters. The first chapter reviews the regulation of the use of force under the UN Charter including the following points: the historical development of the rules of the use of force in international relations; the prohibition of the use of force in international relations established by Article 2(4); the powers and authorities conferred upon the Security Council under Chapter VII; the right of self-defence under Article 51 and the major issues raised in practice regarding the interpretation of this right.

The second chapter examines the Iran-Iraq war 1980-1988. It analyses the origins of this long-lasting conflict and the legal justifications put forward by Iraq for its commencing for the hostilities. The chapter also underlines the poor showing of the Security Council and the

ambiguous reaction of the world major powers towards the war which could be considered significant influences on Saddam Hussein's subsequent behaviour.

The third chapter provides a comprehensive analytical view of the Kuwait crisis and its sequels. It examines Iraq's invasion of Kuwait and the events following this crisis, up to *Operation Desert Storm*, including the measures taken by the Security Council in response to the Iraqi aggression; the "authorization technique" of the use of force invented by the Council in this crisis, which set a precedent for subsequent situations in which the Council deemed appropriate the use of military force; and the proportionality of the force used by the coalition forces in this conflict.

Chapter Four focuses on the principal legal justification put forward by the US and the UK for the 2003 action, namely, the authorization of the use of force established by Security Council Resolution 678. The key question to be considered is whether the mandate of that resolution was extinguished after Iraq had been driven out of Kuwait, or still governed the situation in 2003. The chapter begins by studying the theories and principles of interpretation, including the Vienna Convention on the law of treaties, and their applicability for interpreting the Security Council resolutions. Resolution 678 is then interpreted according to these rules.

Chapter Five is concerned with the argument advanced by the US and the UK regarding Iraq's material breach of the terms of Resolution 687, which laid down the conditions of cease-fire between Iraq and the coalition forces in 1991. The Chapter examines the customary rules governing armistice agreements and whether these rules have been affected by the law of the UN Charter. It also observes the Vienna Convention's rules on the termination or suspension of treaties by one party on grounds of violation by the other party and the applicability of these rules in case of violation of a cease-fire agreement.

The sixth chapter scrutinizes the legality of the disarmament sanctions imposed upon Iraq in Resolution 687 and their compatibility with the principles of the UN Charter. The purpose of doing so in relation to the general purpose this study is to explore whether Iraq had the right to reject or defy the implementation of these measures, should their imposition be proved to be an *ultra vires* or unconstitutional act by the Security Council. To this end, the chapter examines two fields of international law: i) the law of international organizations concerning *ultra vires* acts; ii) the doctrine of estoppel and its applicability in regard to Iraq's notification of acceptance of Resolution 687 and the sanction imposed therein.

Chapter Seven is concerned with the second justification given for the invasion by the US and the UK, which is their right of self-defence in pre-emptive action against threats from Iraq. This claim was of considerable relevance to another major incident that affected the law of the use of force and influenced the situation in Iraq, that is, the events of 9/11 and its aftermath, including the war on Afghanistan in 2001. Therefore, the chapter starts by examining the rules governing the use of force against terrorism before and after the events of 9/11 and State practice in response to terrorist attacks. It highlights the significant changes and alteration of the traditional right of self-defence brought about by 9/11 and its aftermath and discusses how far the use of force against Iraq in 2003 could be justified as a defensive war against terrorism in the light of these developments. The chapter also examines the new doctrine of preventive self-defence adopted by the US administration after the 9/11 attacks and its legality under the Charter system, including State practice as to anticipatory self-defence and to what extent the invasion of Iraq would be accepted on the grounds of this doctrine.

The last chapter looks at the third legal ground for action, which is the humanitarian claim of pro-democratic intervention against the despotic regime of Saddam Hussein. The chapter examines the legal theories that have been said to support a doctrine of unilateral pro-democratic

intervention and their compatibility with the Charter framework of the use of force. It also studies cases that are frequently cited as models for pro-democratic intervention, either unilateral actions taken by individual States or multilateral actions taken under the authority of Security Council to restore democracy, in order to explore whether these practices signify an emerging rule allowing pro-democratic intervention against tyrannical regimes. The chapter finally examines the merits of the Iraqi case and whether it can be characterized and justified as a 'pro-democratic' war.

Chapter 1

Regulation of the Use of Force under the United Nations Charter

Introduction

The impetus behind the creation of a collective security organization, with its ambitious assumption that the use of military power by States could be constrained and even outlawed, developed from the debacle of World War II. The Charter system was a marked departure from that of the League of Nations, and the language of the Charter provides a new terminology and the first expression of the basic rules in their modern form. The UN Charter is explicit in its aim of bringing in a new global era in which State's recourse to force as an instrument of State's policy is abolished, in favour of a system of collective security. This is to be achieved by the use of international military police forces, as well as by measures such as diplomatic and economic sanctions. Such measures are to be used solely by the UN, acting as a united body. However, the Charter does not completely outlaw the unilateral use of force in international relations. If the word "prohibition" had been used, it would mean that force could never lawfully be used under the provisions of the Charter, and this is not the case. What the Charter does is to regulate rather than prohibit the use of force.

This chapter will examine the Charter regulations of the use of force and the major issues regularly associated with their interpretations. The first section briefly reviews the rules of the use of force in the period prior to the creation of the UN. The second section focuses on the prohibition of the use of force in international relations established by Article 2(4). The third section looks at the collective security system created by the Charter, including the powers and authorities conferred upon the Security Council by Chapter VII, the model of enforcement action envisaged by the drafters of the Charter and restrictions on the Security Council's authority. The

fourth section reviews the *travaux préparatoires* of Article 51 in order to investigate the intentions of the drafters regarding the scope of the right of self-defence. The final section highlights some vital issues raised among States and writers regarding the interpretation of Article 51, including the duration of defensive measures, the definition of “armed attack” and whether anticipatory self-defence is permitted under Article 51. The conclusions reached in this chapter will be depended upon in the remainder of the thesis.

Section A: The use of force prior to the UN Charter

Prior to the 20th century, no prohibition of the use of force by States existed; States had the right to wage war to protect their interests, and at their own sovereign discretion.¹ In the absence of legal regulation of the use of force or of any powerful international authority for the enforcement of the law and the protection of rights of individual States, the only constraint was the ethical doctrine of *bellum justum*, espoused by the Christian theology to distinguish between just and unjust wars.² However, this doctrine was based only on subjective criteria and, in the absence of impartial authorities to decide in an objective way the justice of the causes of the belligerents, it was left to the conscience of the acting State.³ Gradually, however, this doctrine was discredited and abandoned in favour of more stable and permanent system. This was the context in which the positivist thought on the law of nations evolved and a basic distinction was observed between the “necessary law of nature” and the “voluntary law of nations.”⁴ The adoption of this approach eliminated the question of the justice of a war, which was held to be beyond any nation to decide, focusing instead on the legality of the war.⁵ In this way, the concept of *bellum legale* was replaced by the concept of *bellum justum*.⁶

With the rejection of the distinction between just and unjust wars, “war became the supreme right of sovereign States and the very hall-mark of their sovereignty.”⁷ To that extent

¹ See generally Elbe, J “The Evolution of the Concept of Just War in International Law”, 33 *AJIL*, 1939; Briggs, H. W, *The Law of Nations*, second edition, Appleton-Century-Crofts, Inc, New York, 1952, p 976

² Alexandrov, S. *Self-Defence against the Use of Force in International Law*, vol. 23, Kluwer Law International, The Hague, Netherlands, 1996, p 3

³ Bowett, W. *Self-Defence in International Law*, Manchester University Press, 1958, p 7-8; see also Kunz, J. “Bellum justum et bellum legale”, 45 *AJIL*, 1951, p 531; Waldock, H. *The Regulation of the Use of Force by Individual States in International Law*, 81 Hague Recueil, 1952, p 456-7

⁴ Alexandrov, note 2 *supra*, p 9

⁵ Ibid.

⁶ Kunz, note 3 *supra*, p 532

⁷ Lauterpacht, H. “The Grotian Tradition in International Law”, 23 *BYIL*, 1946, p 39; see also Briggs, note 1 *supra*, p 976

international law could not be regarded as law as the term is generally understood.⁸ In other words, war was recognized as a “circumstance beyond the power of the law to control.”⁹ From a legal perspective, war was considered to serve as: (i) a method of self-help for resolving conflicts and enforcing rights originating with the law actually in force,¹⁰ as part of a broader concept of defence of legal right and of a remedy against refusal to compensate for violation of legal right;¹¹ (ii) a sanction against those who breached international law;¹² and (iii) a means to challenge the international legal *status quo*.¹³ Thus, war was considered as a judicial procedure, involving execution and punishment, which could be resorted to in order to obtain redress for wrongs in the absence of a system of international justice and sanctions.¹⁴ A State was entitled to defend itself, and to take retaliatory action on behalf of itself and its subjects to redress wrongs: indeed, it was expected to do so, and to be self-sufficient in this respect.

The scope of self-defence in that period was unclear and extended into the sphere of self-help.¹⁵ Although both self-defence and self-help depended on a prior injury received,¹⁶ self-defence, however, constitutes just one form of use of force among other forms of forcible measures of self-help. It operates to protect essential rights from irreparable harm in circumstances in which alternative means of protection are not available; it was to preserve or restore the legal *status quo*. Self-help, however, includes various forms of coercion which do not constitute war in the formal sense, such as retorsion and reprisals.¹⁷ Thus, self-help has a remedial or repressive

⁸ Lauterpacht, *ibid*

⁹ Eagleton, “Attempt to Define Aggression”, *International Council*, 1930, p 583. Quoted in Bowett, note 3 *supra*, p 119

¹⁰ Kunz, J. “The Law of Nations, Static and Dynamic”, 27 *AJIL*, 1933, p 634

¹¹ Bowett, note 3 *supra*, p 11

¹² Alexandrov, note 2 *supra*, p 11

¹³ Kunz, J. “The Law of Nations, Static and Dynamic”, note 10 *supra*, p 634

¹⁴ Alexandrov, note 2 *supra*, p 11

¹⁵ Simma, B. *The Charter of the United Nations; A Commentary*, Volume 1, second edition, Oxford University Press, 2002, p 789

¹⁶ Bowett, note 3 *supra*, p 11

¹⁷ Oppenheim, L. *International Law: A Treatise*, vol. 2, second edition, Longmans, London, 1912, p 34

character in order to enforce legal rights.¹⁸ Under the Charter legal system, this latter function has been taken away from individual States and allocated to the central authority of the international community.¹⁹ Accordingly, apart from self-defence, any other form of self-help became absolutely prohibited.

Towards the end of the 19th century and in the early years of the 20th century, a new tendency towards peaceful settlement of disputes emerged in international relations and the “right of war” was eroded.²⁰ Attempts were made to limit the States’ freedom to wage war by making war in general only a subsidiary means of settling international conflicts. These did not, in fact, abolish war an instrument of national policy; war remained as a legal institution in principle.²¹ As the report of the Peace Conference Commission on Responsibilities of 1919 admitted, “even a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference.”²²

By 1920, it was realized that the complete elimination of war required the availability of an alternative, peaceful way of resolving disputes between nations, a mechanism for enforcing this settlement in the name of the community and, if necessary a power to take sanctions against the disobedient member of the international community. The method of approach was the creation of an international organization which would provide peaceful machinery for the settlement of international disputes, as a substitute for the method of self-help by the use of force.²³ Accordingly, like its successor, the United Nations, the League of Nations was founded for the maintenance of peace and security. The aim in establishing the League of Nations, in 1920, was

¹⁸ Bowett, note 3 *supra*, p11

¹⁹ Ibid

²⁰ Simma, note 15 *supra*, p 789

²¹ Kunz, “The Law of Nations, Static and Dynamic”, note 10 *supra*, p 635

²² “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties”, Report Presented to the Preliminary Peace Conference, 19 March 1919, reprinted in 14 *AJIL*, 1920, p 118

²³ Alexandrov, note 2 *supra*, p 29

to create a new international world order, a new international law, in which war, as a method of self-help, was replaced by organized and peaceful methods of settling international disputes.²⁴

In this view, the Covenant made war, in general, a last resort. Members of the League were, in the event of a dispute, first to exhaust the peaceful procedures provided.²⁵ If, however, these failed to achieve resolution of the dispute, States concerned remain free to resort to war.²⁶ Thus, although the Covenant clearly restricted the right of States to resort to war, war was still a legal institution in principle and as a means of self-help when the peaceful settlement mechanisms failed.²⁷ As to the right of self-defence, there was no specific reservation of that right contained in the Covenant. This was considered to be unnecessary, since self-defence is an inherent right.

The decisive turning-point in the trend towards a general prohibition on war was the Kellogg-Briand Pact in 1928.²⁸ The Pact, for the first time in history, absolutely prohibited the right of war as a notional policy²⁹ and declared that international disputes should only be resolved by pacific means.³⁰ The only exception to this general prohibition of war, although not explicitly

²⁴ Kunz, "The Law of Nations, Static and Dynamic", note 10 *supra*, p 635

²⁵ Article 12 of the Covenant stated that "The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council." Article 13 (1) declared that "The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement." Article 15 (1) also stated that "If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council."

²⁶ Article 15 (7) explicitly stated that "If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice."

²⁷ Kunz, "The Law of Nations, Static and Dynamic", note 10 *supra*, p 635

²⁸ See generally Wright, Q. "The Meaning of the Pact of Paris", 27 *AJIL*, 1933

²⁹ Article I of the Pact stated that "The high contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another." The Kellogg-Briand Pact available at <<http://www.yale.edu/lawweb/avalon/kbpact/kbpact.htm>>

³⁰ Article 2 of the Pact reads: "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." See in *ibid*.

expressed in the Pact, was the right of self-defence.³¹ Although a significant milestone, the Kellogg-Briand Pact had its shortcomings, among them, the failure to provide for sanctions against violators, beyond a statement in the preamble that they “should be denied the benefits furnished by the treaty.”³² A more serious error was that the prohibition was worded solely in terms of war, rather than the use of force in general.³³ This left scope for States to disguise their military actions by not declaring them as war, thereby claiming that they were not in breach of the Pact.³⁴

Section B: The prohibition of unilateral use of force in Article 2(4)

Prior to the Dumbarton Oaks Conference, China, the Soviet Union, the United Kingdom and the United States drew up proposals asserting the prohibition of the use of force as a general principle of the UN, except for enforcement action carried out by the UN itself.³⁵ At the conference, the prohibition of the use of force as a fundamental principle of the UN was agreed. The provisional text was similar in wording to Article 2(4) in its current form. The text of Article

³¹ During the *travaux préparatoires* of the Pact, the French Government maintained that the treaties must be construed so as not to bar the right of legitimate defence. Secretary Kellogg (the American Foreign Secretary) agreed to this interpretation of the French Government. In his speech of 23 June 1928 to some of the original signatories, he stated that “There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence. . . . Inasmuch as no treaty provision can add to the natural right of self-defence, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defence since it is far too easy for the unscrupulous to mould events to accord with an agreed definition.” Dispatch of the American Foreign Secretary of April 23, 1928, quoted in Miller, D. *The Pact of Paris: A Study of the Kellogg-Briand Treaty*, New York, 1928, p 213-214. Similarly, in the Note of the French Minister of Foreign Affairs to the American Ambassador of 14 July 1928, he stated “nothing in the new treaty restrains or compromises in any manner whatsoever the right of self-defence. Each nation in this respect will always remain free to defend its territory against attack or invasion; it alone is competent to decide whether circumstances require recourse to war in self-defence.” Quoted in Lauterpacht, H. *The Function of Law in the International Community*, Oxford Clarendon Press, Oxford, 1933, p 178 at footnotes

³² The Preamble of the Kellogg -Briand Pact, note 29 *supra*

³³ Simma, note 15 *supra*, p 116

³⁴ For example, China and Japan engaged in extensive military operations against each other in 1931 and 1937, after Japan’s invasion of Manchuria, while continuingly denying that a state of war existed between them. Ibid

³⁵ Goodrich L, M. and Hambro, E. *Charter of the United Nations; Commentary and Documents*, second edition, Stevens & Sons, London, 1949, p 6-7

2(4) was simply rendered as: “All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.”³⁶

These words were deliberately chosen. In discussion of Paragraph 4, during the preparation period of the San Francisco Conference, it was suggested by one of the US delegates to strengthen the prohibition in the Paragraph to be read as follows: “All members of the organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the Organization and the provisions of its Charter.”³⁷ However, objections were raised by representatives to inclusion of the phrase “and principles” and “the provisions of the Charter” because they wanted to be sure that, in the event of a Russian veto of UN action, action by the organization, the US could take whatever action was necessary, consistent with the purpose of the Organization. Therefore, they considered the less restrictive obligation implied by the original language was preferable.³⁸ Thus, the US intention was to preserve the right to act unilaterally in case collective security action was hindered.

B.1 At San Francisco Conference

One year later, in San Francisco, in Committee I/1 (entrusted with discussion of the provisions related to the prohibition of the threat or use of force) many States called for this provision to be strengthened with an additional obligation to respect the territorial integrity and political independence of States.³⁹ Australia, for example, proposed adding, after the prohibition of use of force, the words “against the territorial integrity and political independence of any member or

³⁶ *Documents of the United Nations Conference on International Organization (UNCIO)*, San Francisco, 1945, Dumbarton Oaks Proposals, Doc.1, G1, p 3. [Hereinafter UNCIO Doc.]

³⁷ *Foreign Relations of the United States, Diplomatic Papers, 1945*, vol. I, United States Government Printing Office, Washington, 1967, p 426 [Hereinafter Foreign Relations]

³⁸ Ibid.

³⁹ *UNCIO Doc.* vol. 3, Proposals submitted by Mexico p 65, Iran p 554, Bolivia p 578

State, or in any other manner...”⁴⁰ This amendment was adopted unanimously by participants. It was argued that these principles constitute a part of any system of collective security; and the importance of the second principle, in particular, was asserted by drawing attention to “the methods of cunning aggression employed by the totalitarian powers in the creation of artificial States and of puppet regimes.”⁴¹ Unintentionally, however, the amendment created an opening for some, later, to argue that the prohibition against force did not cover minor or temporary invasions that did not actually threaten the territorial integrity of the victim State or its independence.⁴² Such an interpretation, however, is clearly inconsistent with the manifest intent of those who proposed and supported this amendment.

In an attempt further to strengthen Article 2 (4)’s prohibition against the use of force by States, Mexico led a call for insertion of the following principle: “No State has the right to intervene, directly or indirectly, and whatever be the reason, in the domestic or foreign affairs of another.”⁴³

Iran, also, suggested drawing up a paragraph to be read as follows: “All the member States of the Organization should refrain from intervening in their international relations, either directly or indirectly, in the internal affairs of the other States and from the threat or use of force in any manner inconsistent with the purposes of the organization.”⁴⁴ This amendment was motivated by previous instances in which powerful States had coercively used their economic strength to put pressure on weaker States, which had been a cause of disturbance in international relations.⁴⁵

This amendment was rejected, although the same idea is raised in Article 2 (7) which concerns interference in internal affairs of States by the United Nations itself.⁴⁶ Thus, the final form of Article 2(4) reads as follows: “All members shall refrain in their international relations from the

⁴⁰ Ibid. Proposal submitted by Australia, p 543

⁴¹ Ibid. Mexico p 65

⁴² See chapter 8, section B.1 for arguments made to this effect.

⁴³ *UNCIO Doc.* vol. 3, Mexico, p 66

⁴⁴ Ibid, Iran, p 554

⁴⁵ Ibid. Mexico, p 67

⁴⁶ See section C.1.1 below

threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”

This wording certainly represents a significant advance over the similar article in the Covenant⁴⁷ and the Kellogg- Briand Pact,⁴⁸ in that it applies to the use of force in general, not only war. Moreover, the threat of force, as well as its actual use, is forbidden.⁴⁹ It is significant also that Article 2 (4) is to be found in Chapter I, entitled “Purposes and Principles”. This reflects its status as one of the fundamental provisions, in the light of which all other provisions of the Charter are to be understood and including “the directions which the activities of the Organization are to take and the common ends of its members.”⁵⁰ Indeed, the article appears to set up a model of State behaviour, with an emphasis on peace as the fundamental aim of the UN. Since 1945, any debate on the issue of use of force inevitably centres on Article 2(4) of the Charter, which authors have described as “the cornerstone of peace in Charter” or the “heart of the UN Charter.” The International Court of Justice (ICJ) in the *Nicaragua* Case described Article 2(4) as “a peremptory norm of International Law, which States cannot derogate.”⁵¹

B.2 Article 2 (4) and internal conflicts

The wording of Article 2 (4) indicates that the prohibition on the use of force applies to the international relations of States, not to their internal situations.⁵² The questions arise now; did Article 2(4) really intend to eliminate the right of humanitarian intervention? Or to immunize against foreign intervention a State whose government massively violates the basic human rights

⁴⁷ Article 10 of the Covenant of the League of Nations reads: “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.”

⁴⁸ See note 29 *supra*

⁴⁹ Goodrich and Hambro, note 35 *supra*, p 104

⁵⁰ Ibid. p 22

⁵¹ *Nicaragua* case, ICJ Reports, 1986, p 14, para. 190

⁵² Simma, note 15 *supra*, p 608

against its own population?⁵³ Detailed answers to these questions are beyond the scope of the present study; however, it clearly appears from the drafting history that the drafters' intention was to prohibit States from interfering in the internal affairs of one another. Internal struggles, even on the scale of civil war, have always been viewed as an internal matter. Indeed, in many States they have been a typical method of regime change.⁵⁴ It was not the drafters' intention to enable individual States or the Organization to interfere in such situations.⁵⁵

Although this principle is not clear in the text of Article 2 (4) and the proposals by Mexico and Iran⁵⁶ to include an explicit clause to this effect were rejected, the principle of non-interference in domestic affairs was clearly stated in Article 2(7) in regard to the UN itself; a fortiori, then, this principle applies for individual States. Furthermore, any lingering ambiguity surrounding the UN Charter's prohibition against interference in the domestic affairs of States was clarified by the UN General Assembly in its 1965 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*. The declaration, passed without any dissenting votes and only one abstention (Great Britain), asserts that "1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural element, are condemned; 2. Also, no State shall organize, assist, foment, finance, incite, or tolerate

⁵³ Franck, T. *Recourse to Force, State Action Against Threats and Armed Attacks*, Cambridge University Press, Cambridge, 2002, p 2

⁵⁴ Connell, M. "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy", 36 *Columbia Journal of Transnational Law*, 1997, p 481

⁵⁵ Henkin, L. *International Law: Politics, Values and Functions*, 1990, p 165-7; see also Chapter 8 for examination of the alleged 'right' of pro-democratic intervention

⁵⁶ Notes 43 and 44 *supra*

subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.”⁵⁷

These principles were given legal force in the 1970 *Declaration of Friendly Relations*. The Declaration, which has the status of a unanimous agreement, having been passed without a vote,⁵⁸ can be regarded as an authoritative interpretation of the UN Charter’s Principle of non-intervention.

Section C: The Charter’s collective security system

As mentioned earlier, the Charter does not absolutely prohibit or outlaw the use of force, but it provides rules for the use of force under the new world system. Therefore, although the prohibition of the use of force in Article 2 (4) is a basic principle, however, it is qualified by two exceptions: i) action taken for the maintenance or restoration of international peace and security authorized by the Security Council under Chapter VII; and ii) the inherent right of individual and collective self defence, preserved by Article 51. However, these two exceptions are not equivalent; self-defence under Article 51 is only meant to be subsidiary in nature and in no way a substitute for the collective action of the organization.⁵⁹ Therefore, the rules binding the United Nations differ from those applied to individual States. The Security Council was given broader authority to use force in response to threats of aggression as well as to breaches of international peace.

⁵⁷ *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, adopted by UN General Assembly Resolution 2131(XX) of 21 December 1965

⁵⁸ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, adopted by UN General Assembly Resolution 2625 (XXV) of 24 October 1970, see also Chapter 7, section B.2.2

⁵⁹ See section E.1 *infra*

C.1 The Security Council's powers and authorities under Article 39

The UN's primary goal, as set out in Article 1 (1) is the maintenance of international peace and security. These matters are addressed specifically in Chapter VII, beginning with Article 39, which constitutes the basic provision of the whole Charter system for the enforcement of peace. It provides that "The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain international peace and security." Thus, Article 39 contains the legal basis for the application of measures according to Articles 41 and 42. This means that economic sanctions under Article 41 or military sanctions under Article 42 always require the determination of a threat to the peace, a breach of the peace, or an act of aggression in the sense of Article 39.⁶⁰ It therefore appears mistaken to draw a distinction between Articles 39 and Article 42 with respect to the prerequisites for application.⁶¹ In other words, Article 39, as it stands, cannot alone be considered as the basis for such enforcement action because the Article itself refers to Article 42 as the basis for use of force. It is clear from the *travaux préparatoires* for this article that the drafters intended to assign exclusively to the Security Council the responsibility for maintaining international peace and security. The Dumbarton Oaks Proposals entrusted the Security Council with competence to take measures to maintain world peace and international security. At San Francisco, it was proposed that the General Assembly should join with the Security Council in the performance of functions specified in this Article.⁶² Smaller and middle-sized States favoured the idea of giving the General Assembly, as the main organ of the UN, a more important role in maintaining world peace. They hoped they would thereby gain more influence in the decision about enforcement

⁶⁰ Simma, note 15 *supra*, p 612-13

⁶¹ Ibid, p 631

⁶² Goodrich and Hambro, note 35 *supra*, p 156

measures.⁶³ The Sponsoring Powers, however, viewed these proposals as weakening the organization and rejected them in favour of the text of the Dumbarton Oaks Proposals.⁶⁴

Another concern raised at San Francisco was the absence of any precisely defined principles or standards to control the Security Council's interventions. A number of States called for stronger regulation in this respect. The need was highlighted for the Security Council in the performance of its function to be guided by the basic purposes and principles of the organization as set in Articles 1 and 2.⁶⁵ This general guidance for the Security Council in performing its functions was not inserted in the text of Article 39; instead, it is to be found in Article 24(2) of Chapter V regarding "Functions and Powers."⁶⁶ Thus, the Charter Principles and the purposes related to them could be considered as boundaries for the Council's authority in imposing sanctions.

Some delegates, however, considered this inadequate and called for a definition of aggression to be incorporated in the text of the Charter and made binding on the Security Council.⁶⁷ The US and the UK, however, were among those who asserted the impossibility of an exhaustive

⁶³ New Zealand proposed that "the General Assembly shall have the right to consider any matter within the sphere of international relations." *UNCIO Doc.* vol. 3, p 487. Bolivia similarly demanded the common action of the GA and the SC: "The General Assembly should have the right to consider the general principles of cooperation in the maintainance of international peace, security and justice." *Ibid*, Bolivia, p 583. Egypt proposed that all decisions of the Security Ccouncil should be presented to the General Assembly, which would be authorized to suspend or rescind them by a three-quarters majority. *Ibid*, p 459-60. Of significance, Iran proposed that the General Assembly should be able to intervene should the Security Council fail to reach a decision within a certain time-limit. Iran's proposal reads: "The General Assembly can always draw the attention of the Council to a dispute or to all situations capable of endangering peace, and fix an adequate delay within which the Council should pronouns its decision on the question submitted to it. It, at the expiration of this period, the Council is unable to reach a decision, the Assembly can intervene and take the necessary measures." *UNCIO Doc.* vol. 3, Amendments proposed by Iran, p 555. Although this proposal also was rejected at the time, in November 1950, the Assembly adopted the *Uniting for Peace* resolution, which gave it power to discuss and make recommendations on matters of peace and security if the Council found itself deadlocked. Members were also to hold armed forces ready in the event that the Council failed to act. The *Uniting for Peace* resolution was first used in 1954 when the U.K. and France vetoed Security Council resolutions during the Suez crisis. Following a General Assembly demand to do so, those two countries withdrew their troops.

⁶⁴ Simma, note 15 *supra*, p 607; see also Goodrich and Hambro, note 35 *supra*, p 156

⁶⁵ Goodrich and Hambro, *ibid*, p 157

⁶⁶ Article 24(2) states that "in discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations."

⁶⁷ See proposal submitted by Bolivia. *UNCIO Doc.* vol. 3, p 579. This proposal received the support of numerous States. Simma, note 15 *supra*, p 608

definition and argued that too rigid a rule could result in premature imposition of sanctions.⁶⁸

Ultimately, at the San Francisco Conference it was decided to not to attempt a detailed definition of aggression for the guidance of the Security Council.⁶⁹

Turning back to the text of Article 39, under this article, the Security Council, in the first place, has to determine “the existence of any threat of the peace, breach of peace, or act of aggression.”

The Security Council has an unfettered discretionary power to decide in each case whether a particular act constitutes any of these specified acts.⁷⁰ Once the determination that one of these acts has been found has been made, the Council can either “make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42” Thus, a clear distinction is made between recommendations on the one hand and decisions on measures under Articles 41 and 42 on the other. It is generally assumed in the legal literature that “recommendations” under Article 39 are understood to refer to Chapter VI provisions calling for the pacific settlement of international disputes, to be pursued either alone or in tandem with economic and/or military decisions taken in accordance with Articles 41 and 42.⁷¹ According to this view, it is not possible to justify enforcement measures, which would interfere with the international legal rights of the affected State, on the basis of a recommendation.⁷² In other words, non-binding recommendations according to Article 39 cannot encompass enforcement measures under Articles 41 and 42. However, occasionally it has been suggested that enforcement measures according to Articles 41 and 42 may also be based on recommendations.⁷³ The first view seems

⁶⁸ Simma, *ibid*

⁶⁹ See Report of Rapporteur of Committee III/3 to Commission III on Chapter VIII, section E.2 *infra*

⁷⁰ Goodrich and Hambro, note 35 *supra*, p 156; see also *Foreign Relations*, 1945, p 700

⁷¹ Goodrich and Hambro, *ibid*, p 158

⁷² Simma, note 15 *supra*, p 614-5

⁷³ Recommendation under Article 39 was held by some writers to be the basis for the Council’s response to North Korea’s attack on South Korea in 1950. This view was based on the language of SC Resolution 83 of 27 June 1950 where the Council “recommend[ed] that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international

more appropriate and compatible with the historical background of Article 39 which indicates that the binding character of enforcement against the State subject to the measures; this is more likely to be achieved through binding decisions, not recommendations. The final report of Committee III/3 at San Francisco voted unanimously that:

“ (I) In using the word “recommendations” in Section B, as already found in paragraph 5, Section A, (Article 36, paragraph 1) the Committee has intended to show that the action of the Council so far as it relates to the peaceful settlement of a dispute or to situations giving rise to a threat of war, a breach of the peace, or aggression, should be considered as governed by the provisions contained in Section A.(Chapter VI) Under such an hypothesis, the Council would in reality pursue simultaneously two distinct actions, one having for its object the settlement of the dispute or the difficulty, and the other, the enforcement or provisional measures, each of which is governed by an appropriate section in Chapter VIII.

(II) It is the Committee’s view that the power given to the Council under paragraphs 1 and 2 (Articles 39 and 40) not to resort to the measures contemplated in paragraphs 3 and 4, (Articles 41 and 42) or to resort to them only after having sought to maintain or restore peace by inviting the parties to consent to certain conservatory measures, refers above all to the presumption of a threat of war. The Committee is unanimous in the belief that, on the contrary, in the case of flagrant aggression imperiling the existence of a Member of the Organization, enforcement measures should be taken without delay, and to the full extent required by circumstances, except that the Council should at the same time endeavour to persuade the aggressor to abandon its venture, by the means contemplated in Section A and by prescribing conservatory measures.”⁷⁴

From this report the following observations can be made:

peace and security in the area.” See, for example, Higgins, R. *The Development of International Law Through the Political Origins of the United Nations*, Oxford University Press, Oxford, 1963, 197-210
⁷⁴ Report of Rapporteur on Chapter VIII, Section B, *UNCIO Documents*, Doc, 881, III/3/46, p 6

- (1) The recommendations of the Security Council are intended to be made in connection with its efforts to achieve a pacific settlement under Chapter VI.
- (2) Within the framework of Article 39, recommendations can be a preliminary to further measures, in particular enforcement measures under Articles 41 and 42.
- (3) Binding decisions of the Security Council are to be taken only with regard to measures under Articles 41 and 42 necessary to restore international peace and security.
- (4) The Security Council is not required to attempt peaceful settlement before resorting to enforcement measures under Articles 41 and 42; in case of flagrant violation of international peace and security, the Council can take these enforcement measures promptly from the outset.⁷⁵
- (5) Efforts at peaceful settlement will presumably continue even during the period when enforcement action is being taken.

Despite the apparent intention of the drafters that enforcement measures are to be achieved through binding decisions, however, nothing in the text of Article 39 definitely excludes the possibility that “recommendations” may encompass enforcement action under Articles 41 and 42, although such an interpretation is highly doubtful.

C.1.1 Qualifications on the Council’s authority and the concept of “threat of peace”

The Charter rests on the requirement of an assessment by the Security Council, of the existence of a threat to or breach of the peace. A determination to that effect triggers the Council’s power under Chapter VII to take measures “to maintain or restore international peace and security.” By using the words “international peace”, Article 39 confines the Council’s right to take measures to threats to or breaches of international peace; it does not refer to the use of force in States’ internal affairs, such as civil war. Hence, it is understood that the drafters of the Charter meant to restrict the Council’s authority to intervene in such situations, breaches of “peace”

⁷⁵ See Chapter 3, section A.3 for an arguments to the contrary by the Representative of Yemen in the Security Council

notwithstanding. This restriction upon the Council to intervene in response to violent conflict within States is explicitly stated in Article 2(7).⁷⁶ This article plainly states that the internal affairs of members are out-of-bounds for the Organization. This limitation is consistent with the Charter's preservation of the "autonomy" value.⁷⁷

In the early years after the creation of the UN, the organization showed no sign of ability or willingness so to intervene. For example, in April 1946, Poland brought the circumstances in Spain before the Security Council under Article 35, and requested that it decide on measures according to Articles 39 and 41. However, the sub-committee appointed to investigate the question concluded that neither a breach of the peace nor a threat to the peace existed.⁷⁸ Over the years, however, the Council changed its position and repeatedly shown a tendency to include the internal situation of a State in the concept of peace, above all with respect to the violation of human rights.

The closest the U.N. has come to intervening in a civil war was in the Congo in 1960. On 14th July 1960, the Security Council adopted Resolution 143, in which it called upon Belgium to remove its troops from Congo and authorized the Secretary-General to provide "military assistance" to the Congolese forces to counter Belgian intervention.⁷⁹ The UN reacted quickly and established United Nations Operation in the Congo (ONUC), although France and the Soviet Union objected to this action, claiming it contravened the Charter and refused to contribute to the cost of the action.

In 1965, when Rhodesia unilaterally declared its independence from the UK, the Council condemned the illegal racist minority regime by the "illegal authorities in Southern Rhodesia"

⁷⁶ Article 2(7) reads "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

⁷⁷ Connell, note 54 *supra*, p 481

⁷⁸ Report of the Sub-Committee on the Spanish Question, UN Doc. S/75 (31 May 1946)

⁷⁹ Security Council Resolution 143 of 14 July, 1960

and called upon the UK to “put an end to it.”⁸⁰ In 1966, the Council adopted Resolution 221 which expressly characterized the situation in Rhodesia as a “threat to the peace” and specifically authorized the UK to block vessels believed to be transporting oil to Southern Rhodesia, contrary to a Security Council embargo by using force if necessary.⁸¹ With regard to South Africa, in 1977, the Council adopted Resolution 418 in which it condemned the apartheid in South Africa and determined that this regime constitutes a “threat to international peace and security.”⁸² Accordingly, acting under Chapter VII, the Council determined to impose an armed embargo on the South African Government.

Despite these episodes, the greatest impediment to Security Council intervention in civil conflicts was not so much the legal restrictions on intervention in internal affairs, but the Cold War between the United States and the Soviet Union, whereby a Council decision to use force was generally viewed as favouring or disfavouring one side or another. Consequently, a veto was inevitable.⁸³ After the Cold War, however, the scope of action of the Security Council in relation to such interventions under Article 39 was widened; the Council has subsequently intervened in several internal conflicts and paid greater attention to regimes that violate human rights.

In Resolution 688 of 1991 the Council viewed the savage repression against dissident minorities in Iraq and the exodus of a large numbers of Kurdish and Shiite opponents into neighbouring Turkey and Iran as a threat to international peace and security.⁸⁴ Accordingly, France, the United Kingdom, and the United States, set up no-fly zones or enclaves, in order to protect Iraqi Kurds from repression by Iraqi troops. They argued that Resolution 688 implicitly authorized the use of

⁸⁰ Security Council Resolution 217 of 20 November 1965

⁸¹ Security Council Resolution 221 of 9 April 1966

⁸² Security Council Resolution 418 of 4 November 1977

⁸³ Connell, note 54 *supra*, p 482

⁸⁴ Security Council Resolution 688 of 5 April 1991

force for patrolling these zones and to provide safe havens to the Kurdish refugees.⁸⁵ Similarly, after the outbreak in Yugoslavia in 1991 of violence between forces of the Federal Government and the two States of Slovenia and Croatia, which had declared themselves independent, the Security Council invoked Chapter VII and characterized the situation as a “threat to international peace and security.”⁸⁶ In 1992, the Council determined that the situation in Somalia constituted a threat to international peace and security. Therefore it decided under Chapter VII that all States should, “for the purpose of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia.”⁸⁷ Likewise, after deciding that “the situation in Liberia constitutes a threat to international peace and security, particularly in West Africa as a whole,”⁸⁸ it imposed an embargo on all deliveries of weapons to Liberia.⁸⁹ In 1993 the Council invoked Chapter VII against Haiti, determining the existence of a threat to international peace since the legitimate Government, which had been overthrown by a military government was not reinstated. The Security Council referred expressly to the refugee problem.⁹⁰

Thus, despite the apparent restriction on the Council’s authority to intervene in internal situations, it is clear that the Council views internal conditions within a State as a threat to peace that necessitates its interference. The tendency of the Council to involve itself in matters traditionally supposed to belong to States’ domestic jurisdiction reflects the rising consciousness of despotic regimes that violate human rights. In addition, even if a civil war or a massive violation of human rights within a State is not in itself a breach of international peace; however, it can certainly have international implications and lead to a threat to international peace. Indeed,

⁸⁵ See Chapter 4, section C.4.1 part III

⁸⁶ Security Council Resolution 713 of 25 September, 1991

⁸⁷ Security Council Resolution 733 of 23 January, 1992

⁸⁸ Security Council Resolution 788 of 19 November, 1992

⁸⁹ Ibid. See also Chapter 4, section C.3.1

⁹⁰ Security Council Resolution 841 of 16 June, 1993. See also Chapter 8, section C.2.1

fighting on a considerable scale resulting in exodus of refugees with the possibility of outside intervention can always be considered to be a threat to the peace. Therefore, it seems now to be accepted that extreme violence within a State can generally be qualified as a threat to the peace that justifies Council intervention.

The Council, however, did not restrict its interference only to violent internal situations; it extended its authority to limit the States' freedom of armament. Notably, the ICJ expressly referred in its *Nicaragua* decision to the freedom of States to decide on their armament.⁹¹ Nevertheless, the Security Council has in some circumstances considered measures with respect to armament as a threat to the peace. In 1991, the Council imposed a disarmament regime on Iraq in Resolution 687.⁹² This decision under Chapter VII was unprecedented in the UN history and triggered intense debate regarding Iraq's sovereign rights.⁹³ Recently, the Council expressed its concerns regarding the Iranian nuclear programme and "call[ed] upon Iran without further delay" to comply with the regulations of the IAEA and to "suspend all enrichment-related and reprocessing activities, including research and development." Following Iran's failure to comply with these demands, the Council adopted Resolution 1737 of 2006 in which it imposed an embargo on supplying Iran with any "items, materials, equipment, goods and technology" which could contribute to Iran's nuclear programme.⁹⁴ In that resolution, the Council expressly stated that it was acting under Article 41 of Chapter VII. Surprisingly enough, however, the Council did not mention, in that resolution or any other related resolution,⁹⁵ that the Iranian nuclear programme constitutes a threat to the international peace and security. Nevertheless, while a determination of the Council is a prerequisite for a decision on further measures under Chapter

⁹¹ *Nicaragua* case, ICJ Reports, 1986, p 135, para. 269

⁹² Security Council Resolution 687 of 3 April 1991

⁹³ See Chapter 6 for examination of the legality of the Council disarmament obligations on Iraq

⁹⁴ Security Council Resolution 1737 of 23 December 2006

⁹⁵ Security Council Resolutions 1686 of 31 July, 2006 and 1747 of 24 March 2007

VII and the practice of the Council was consistent in citing such determination before proceeding to take measures under Chapter VII, in fact, there is nothing in the text of Article 39 requiring the Council to state such a determination explicitly in its resolution. Therefore, it could be argued that the omission of such expression from the text of the resolution does not affect its legality.

To conclude, it seems that, in reality, the concept of "threat to the peace" has an endless flexibility which allows the Security Council to take whatever action it deems necessary to maintain international peace and security regardless, whether this action may be considered interference in the State's domestic jurisdiction. In other words, when international peace and security and the sovereign rights of a State are at odds, the former prevails. Furthermore, the term "threat to international peace and security", as Henkin rightly observed, "is not capable of legal definition, but only of political determination by a political body."⁹⁶

C.2 Articles 41 and 42

According to Article 39, once a "threat to the peace, breach of the peace, or act of aggression" is found, the Security Council shall "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." This implies that measures decided by the Council should fall under one or other of these provisions: Article 41 in the case of non-forcible measures, and Article 42 otherwise. Article 41 empowers the Council to take non-forcible measures such as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." If these non-forcible measures "would be inadequate or have proved to be inadequate," the Council can proceed to take forcible measures under Article 42, such as "action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." Thus, a prerequisite for the application of Article 42 is the judgment of the Security

⁹⁶ Henkin, L. "Conceptualizing Violence: Present and Future Developments in International Law", 60 *Alabama Law Review*, 1997, p 575

Council as to the actual or likely inadequacy of measures provided for in Article 41.⁹⁷ However, neither the drafting history of Article 39, discussed above, nor the language of Article 42, indicates a requirement that Article 41' measures have previously been ordered and implemented; the Council may opt immediately for Article 42 on the basis of its opinion that measures under Article 41 would be ineffective. In practice, however, the Council has never taken this option. Even in the most egregious violations, such as the Kuwait crisis, peaceful and non-forcible measures have been attempted first. Measures pursuant to Article 42 are a final recourse against a State which refuses to comply with the orders of the Council.⁹⁸

A widely held view is that the Council's authority to have recourse to military action under Chapter VII can only be found in Article 42.⁹⁹ Article 42 explicitly authorizes the Security Council to "take action by air, sea, or land forces" as appropriate. No other article contains such an express provision. In fact, the historical background of Article 42 indicates clearly that the intention of the drafters was that forcible action is to be decided upon and implemented by the Security Council under Article 42 first and foremost, but not exclusively. During the preparatory work on the UN Charter, the Sponsoring Powers agreed that the new organization should be given authority to enforce international peace and security by military means if necessary.¹⁰⁰ They intended to introduce a fundamental innovation in comparison to the League of Nations Covenant, where the League Council could only "recommend to several Governments concerned" to take military action against an aggressor State.¹⁰¹ In contrast, Article 42 allows the

⁹⁷ Simma, note 15 *supra*, p 631

⁹⁸ See Chapter 3, section A.1 & A.2

⁹⁹ See, for example, Kelsen, H. *The Law of the United Nations, A Critical Analysis of Its Fundamental Problems*, Stevens & Sons, London, 1951, p 756

¹⁰⁰ Chapter VIII, section B, sub-section 4 of the Dumbarton Oaks Proposals corresponds almost verbatim to what later became Article 42 of the UN Charter. *UNCIO Documents*, Dumbarton Oaks Proposals, Doc.1, G1, p 15

¹⁰¹ Article 16 of the Covenant allowed the League Council to "recommend to several Governments concerned what effective military, naval or air forces the Members of the League shall severally that States apply armed force against an aggressor."

Security Council to take the necessary forcible action itself,¹⁰² albeit through the armed forces of the organization's members. To this end, Article 43 provides for that the Security Council is to have at its disposal troops designated by member States to be on the ready to maintain international peace, pursuant to agreements between the Council and individual member States. These forces, according to Article 47, will be placed under the command of a Military Staff Committee,¹⁰³ which will coordinate the activities of these troops and direct military operations under the control of the Security Council.¹⁰⁴ Thus, the Article 42 power of the Security Council to apply armed force cannot be read alone; it should be read in conjunction with the following articles, in particular, Article 43.

C.3 Article 42 dependency on Article 43

Article 42 has a dependent relationship with Article 43, pursuant to which the UN members consent to provide the Security Council, "on its call and in accordance with a special agreement or agreements," with armed forces, assistance, and facilities to effectuate Article 42. Thus, it was envisaged that arguments would be made to establish a procedure through which the Security Council could call on the members for military forces, assistance, and facilities, including rights of passage. On the other hand, the reference to special agreements implies that such assistance is voluntary; the Security Council cannot oblige member States to provide military forces or facilities without agreements according to Article 43.¹⁰⁵ Overall, Article 43 seems to provide the essential mechanism for carrying out such military operations.

¹⁰² Kelsen, note 99 *supra*, p 763

¹⁰³ Article 47 (1) reads: "There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament."

¹⁰⁴ Article 47 (3) reads: "The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently."

¹⁰⁵ Kelsen, note 99 *supra*, p 759; see also Goodrich and Hambro, note 35 *supra*, p 166-7

Article 42's dependent relationship with Article 43 is explicitly acknowledged in Article 106 of the Charter, delineating post-World War II transitional security arrangements "pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42." Ergo, Article 106 clearly suggests that special agreements with member States, for the provision of armed forces and facilities to be on call for Security Council action, are a condition precedent to collective military measures by the Council. This would mean that action could not be taken under Article 42 in the absence of a special agreement concluded under the terms of Article 43. This view was held by governments at the San Francisco Conference and has often been expressed by commentators on the Charter.¹⁰⁶

This formula for forcible action, however, is not exclusive. Inference can be made from Article 106 that armed force may be applied under Chapter VII even without the special agreements provided for in Article 43.¹⁰⁷ The article went on to state that the Five Permanent Members shall "consult with one another and as occasion requires with other members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security." In this respect, the view is correct that Article 42 does not require troops to have been placed at the disposal of the Security Council according to Article 43. This was the view held by the ICJ in the *Certain Expenses Advisory Opinion*. In that case, the Court rejected the argument that the Security Council could not take action in a situation threatening the peace without agreements having been concluded according to Article 43. Although the ICJ did not expressly invoke Article 42, it appears that the Court

¹⁰⁶ Kelsen, for example, argued that "It seems that according to the intention of the framers of the Charter, the Security Council is authorized to take enforcement action involving the use of armed force only through the armed forces made available to it by the special agreements concluded in conformity with Article 43." Kelsen, *ibid*, p 756

¹⁰⁷ Simma, note 15 *supra*, p 127

accepted the view that the Security Council can authorize or call upon a particular State or group of States to take specific measures on its behalf.¹⁰⁸ In other words, it can give them an assignment and powers with respect to a particular mission when it deems appropriate to do so. This proposition is enhanced further by the wording of Article 48.

C.4 Article 48

Article 48 is another salient provision in Chapter VII of the Charter.¹⁰⁹ This provision clearly imposes an obligation on Members of the United Nations to take action necessary to implement a decision taken by the Council, which may likewise relate to military measures. Any mandatory decision by the Council therefore falls within the scope of Article 48, even if it is not expressly cited.¹¹⁰ Significantly, Article 48 particularly applies to situations in which the Council requires action by a particular State or group of States, “as the Council may determine.” Accordingly, Article 48 endorses the proposition that enforcement action is not necessarily be taken by Security Council standing forces; instead, it indicates that the Council is entitled to assign the mission it has decided upon to a particular State, a group of States or a regional organization.

Section D: The inherent right of individual and collective self-defence

The law on self-defence and use of force by States is the subject of the most fundamental disagreement between States and writers. This section reviews the drafting history of Article 51 in order to clarify the intention of the drafters of the Charter regarding the scope and extent of this right. The major disputes regarding the interpretation of Article 51 will be examined in the following section in light of the *travaux préparatoires* highlighted here.

¹⁰⁸ *Certain Expenses* case, ICJ Reports, 1962, p 167; see also Chapter 3, section C.2

¹⁰⁹ Article 48 states that “The action required carrying out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Member States of the United Nations or by some of them, as the Security Council may determine. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”

¹¹⁰ Simma, note 15 *supra*, p 633; see also Kelsen, note 99 *supra*, p 763

D.1 Dumbarton Oaks Proposals

In the Dumbarton Oaks Proposals, surprisingly, the right of self-defence was not mentioned.¹¹¹ At the conference, the ban on the threat or use of force “in any manner inconsistent with purposes of the organization” was not seen as ruling out the exercise of the right of self-defence, which was thought to be implicit in the Proposals.¹¹² The Dumbarton Oaks Proposals, in a sense, followed the Covenant of the League of Nations and the Pact of Paris; since the prohibition of recourse to war under those previous treaties had never precluded the use of force in self-defence, the Dumbarton Oaks Proposals similarly contained no express reservation of the right of self-defence. This interpretation is supported by the response to a question raised by the Chinese delegate, whether it would be possible under the document for either member or non-member States to use force unilaterally under the claim that such action was not inconsistent with purposes of the Organization. He accepted the explanation that, except in cases of self-defence, no unilateral use of force could be undertaken without the approval of the Council.¹¹³ It was made clear that the right of self-defence was not abolished or limited by anything in the Dumbarton Oaks text. In addition, a State using force in self-defence would not be held to act in a manner inconsistent with the purposes of the organization.

This issue of self-defence was raised again by the American delegation during the preparation for the San Francisco Conference. The question was raised whether a provision should be included in the Charter, explicitly reserving the right of self-defence, especially, since there was nothing in the Proposals.¹¹⁴ The concern was the potential risk arising from the obligation contained in Section A, Paragraph 3, which describes the measures that parties to a dispute are expected to apply in an attempt to reach a peaceful settlement. If, despite being willing to seek a resolution

¹¹¹ *UNCIO Documents*, Dumbarton Oaks Proposals, Doc.1, G1

¹¹² Alexandrov, note 2 *supra*, p 78

¹¹³ *Foreign Relations*, 1944, p 862

¹¹⁴ *Ibid*, 1945, p 426-29

by peaceful means, a State suffered military attack, it would clearly be entitled to defend itself.¹¹⁵ The question was what would happen if a State party rejected efforts of pacific settlement, and whether, if the Council failed to act immediately, a country was free to act. Furthermore, questions were raised about the situation in the period between the failure of peaceful means of settlement and a decision by the Security Council to adopt military measures.¹¹⁶

The general view was that if a dispute was not settled by peaceful means, and an innocent State was attacked, it was justified in making use of its own forces. It was asserted that the right of self-defence existed implicitly in the document. It was assumed that this right was inherent, provided it was not expressly precluded by the language of the Charter.¹¹⁷ Furthermore, the criterion of legitimacy could still be the compatibility of the action taken with the purposes of the Organization. In other words, under the proposed Charter, member States pledged to refrain from the use of force in a manner inconsistent with purpose of the Organization. Since the prevention of aggression was a purpose of the Organization, action to prevent aggression in the absence of action by the Security Council would be consistent with the purpose of the Organization. In addition, there might be circumstances when the individual use of armed forces by a State might be viewed as serving the purposes of the Organization. Whilst accepting the logic of this interpretation, the US delegation thought the inclusion of an authoritative pronouncement would be useful.¹¹⁸

Thus, it seems from these discussions that the majority of delegations were convinced that the proposed Charter should include a provision that a State might have the right to act in an

¹¹⁵ Ibid, p 427

¹¹⁶ Ibid

¹¹⁷ Ibid, p 592-94

¹¹⁸ One Representative, however, questioned the use of all the provisions of the Organization, if the right of self-defence under all circumstances remained fundamental; was taken as inherent and inalienable. If the intention was that each State would still be entitled to use military force whenever saw fit, as long as it could claim the motive of self-defence, the Organization's machinery appeared redundant. Ibid, p 428

emergency, however, the State availing itself of that right should notify the Council.¹¹⁹ In the event of any challenge regarding the compatibility of the action with the purposes of the Organization, the Security Council might review it.¹²⁰ Regarding the wording of that right in the Charter, it was remarked that no effort should be made to define the right of self-defence since to define it simply raised the question as to what constitutes self-defence.¹²¹ Therefore, the statement about self-defence in the proposed Charter should be made in general language.¹²²

D.2 San Francisco Conference

At San Francisco, Committee I/1 took the stance that the “use of arms in legitimate self-defence remains admitted and unimpaired.”¹²³ Nevertheless, none of the amendments proposed at San Francisco on the provision that subsequently became Article 2(4), explicitly mentioned the right of self-defence,¹²⁴ except for an amendment proposed by the delegate of Panama, which stated that “Each State has a legal duty to refrain from any use of force and from any threat to use force in its relations with another State except as authorized by this Charter; but subject to immediate reference to and approval by the competent agency of the (here the name of the organization), a State may oppose by force an unauthorized use of force made against it by another State.”¹²⁵

Article 51, however, has its origins elsewhere. Committee III/4, which addressed the issue of how to harmonize the existing regional arrangements with the proposed UN Charter, confronted the issue of freedom of action in self-defence.¹²⁶ Initially, the issue in question was whether regional organizations were free to take enforcement action. The Dumbarton Oaks Proposals had

¹¹⁹ Ibid, p 594

¹²⁰ Ibid, p 429

¹²¹ Ibid, p 593

¹²² Ibid, p 428

¹²³ Report of Rapporteur of Committee I to Commission I, *UNCIO Documents*, vol. 6, p 459

¹²⁴ See Proposals of Australia, *UNCIO Documents*, vol. 3, p 557; Bolivia, p 558; Brazil, 558; Costa Rica, p 560; Iran, p 563. A proposed amendment submitted by New Zealand provided that “All members of the Organization undertake collectively to resist every act of aggression against any member.” Ibid, p 564

¹²⁵ Proposal submitted by Panama, *ibid*, p 565

¹²⁶ Bowett, note 3 *supra*, p182

provided for the use by the Security Council of regional arrangements or agencies as vehicles for enforcement action, but precluded enforcement actions under such arrangements without the authorization of the Council.¹²⁷ However, such authorization would depend on a voting system derived from the statement of the Four Sponsoring Powers, under which the agreement of all the permanent members would be needed.¹²⁸ In effect, however, any such member could veto the conduct of forceful action by a regional organization. This provision worried the Latin American countries, which had recently (at Mexico City Conference, 21 February - 8 March, 1945) drawn up a regional arrangement: the Act of Chapultepec. They argued that "to give European and Asian Powers a veto over action within the Western Hemisphere would be a violation of the sacrosanct Monroe Doctrine."¹²⁹ The US delegate, Senator Vandenberg, shared their concern. He proposed an addition to the amendment, which would expand the exception to allow forcible measures taken under the inter-American system without Security Council authorization.¹³⁰

Others, however, objected to Vandenberg's proposal on the ground that removal of the inter-American system from Security Council control would mean also the loss of US power to veto military action under a European or a Western Pacific regional arrangement; the acceptance of general exceptions for regional arrangements would undermine the organization.¹³¹ In addition, a purely defensive regional action would not necessarily be blocked by the Security Council, because the reserved rights of States individually and collectively would still be available. In other words, the view was expressed that since the right of self-defence, including collective self-defence, was implicit, the United States could take defensive action on behalf of an American

¹²⁷ Chapter VIII (C) (2) of the Dumbarton Oaks Proposals provided that "no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council." *UNCIO Documents*, Dumbarton Oaks Proposals, Doc.1, G1, Chapter VIII, Section C

¹²⁸ Brownlie, I. *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1963, p 270

¹²⁹ Quoted in Alexandrov, note 2 *supra*, p 83-4

¹³⁰ *Foreign Relations*, 1945, p 695; see also Vandenberg, A. *The Private Papers of Senator Vandenberg*, Gollancz, Westport, 1952, p 189

¹³¹ *Foreign Relations*, *ibid*, p 619

country, such action being then subject to Security Council review.¹³² Thus, the need was perceived to permit the Security Council to authorize enforcement action, since otherwise there would be nothing more than a regional system. On the other hand, States should retain the essential right of self-defence and could act if attacked but should then immediately report such action to the Security Council.¹³³

The idea that regional arrangements “providing for automatic action” could be accepted “as constituent elements of collective security, on condition that they should be conceived for the exclusive purpose of defence” and any emergency measures should be reported “within the shortest possible time” to the Security Council along with the “justification of the urgency of the action” had already been put forward by Turkey.¹³⁴ The Turkish delegate stated that “the Proposals do not contain any provision on the subject of legitimate defence. Although this right is of an obvious nature, it would be useful to insert in the Charter a provision justifying legitimate defence against a surprise attack by another State. Nevertheless, even in such a case the Council should have an entirely free hand to judge the circumstances under which legitimate defence has occurred, as well as the justification for the measures taken by the party which has been compelled to defend itself.”¹³⁵

Following discussion of the issue by the Sponsoring Powers, it was agreed that (i) an expansion of the Dumbarton Oaks Proposals to allow for collective regional enforcement action would undermine the whole purpose and nature of the organization; (ii) on the other hand, if an armed attack occurred in case of failure to act on the part of the Security Council, action could be taken in self-defence, either individually or under a regional arrangement; (iii) action to prevent

¹³² Ibid, p 592

¹³³ Ibid, p 592-3

¹³⁴ *UNCIO Documents*, vol. 3, Suggestions of the Turkish Government, p 483

¹³⁵ Ibid

aggression, if no action was taken by the Security Council, was compatible with the purposes of the organization.¹³⁶

Subsequent to this discussion, the advisers of the United States delegation drafted a new paragraph to be added to Chapter VIII, Section B of the Dumbarton Oaks Proposals (on action against aggression), rather than to Section C (on regional arrangements). The amendment referred to regional arrangements as an example of self-defence against armed attack, rather than as an exception to the general rule that regional enforcement action was subject to Council authorization, thereby distinguishing between regional enforcement action (which was not encompassed in the amendment) and regional action in self-defence.¹³⁷ The American proposal read: "In the event of an attack by any State against any member State, such Member State possesses the inherent right to take measures of self-defence. The inherent right to take measures of self-defence against armed attack shall apply to arrangements, like those embodied in the Act of Chapultepec, under which all members of a group of States agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall be reported immediately to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security."¹³⁸

The favoured approach of France seemed to be that, if the Council failed to act, members would have the reserved right to take individual action. The French proposal read: "Should the Council not succeed in reaching a decision the members of the organization reserve to themselves the right to act as they may consider necessary in the interest of peace, right and justice."¹³⁹ The American delegation was of the opinion that the French proposed amendment was "unduly

¹³⁶ Alexandrov, note 2 *supra*, p 85

¹³⁷ Ibid. p 85-6

¹³⁸ *Foreign Relations*, 1945, p 674

¹³⁹ Ibid. p 677

restrictive, involving a negative concept.”¹⁴⁰ Moreover, it raised the question of how to determine that the Security Council had failed to act.¹⁴¹ Despite these concerns, however, the United States agreed with the French proposal and reworded its proposal to make clear that the independent operation of regional arrangements would be applicable only in self-defence and only in the event of failure of the Council to act. The amended US proposal read: “Should the Security Council not succeed in preventing aggression, and should aggression occur by any State against any member State, such Member State possesses the inherent right to take necessary measures for self-defence. The right to take such measures for self-defence against armed attack shall also apply to understandings or arrangements like those embodied in the Act of Chapultepec, under which all members of a group of States agree to consider an attack against any one of them as an attack against all of them....”¹⁴²

This proposal was, however, still not satisfactory to the United Kingdom and Soviet delegates, who objected that it would lead to a series of regional organizations acting independently of the world institution. Objecting to the specific reference to the Act of Chapultepec, the United Kingdom also pointed out that this would precipitate additional pressure for the inclusion of references to the Arab League, etc.¹⁴³ The United Kingdom proposed a revised text: “Nothing in this Charter should invalidate the right of self-defence against armed attack, either individual or collective, in the event of the Security Council failing to take the necessary measures to maintain or restore international peace and security”¹⁴⁴

An alternative proposal was offered by the Soviet Union delegate, beginning, “Nothing in this Charter impairs the inherent right of self-defence, either individual or collective, if prior to

¹⁴⁰ Ibid. p 665

¹⁴¹ Ibid

¹⁴² Ibid, p 685-86

¹⁴³ Ibid, p 704

¹⁴⁴ Ibid

undertaking the measures for the maintenance of international peace and security by the Security Council an armed attack against a member State occurs.”¹⁴⁵ The United States delegate was also of the view that countries were entitled to act in self-defence “if an armed attack occurs against a member State before the Security Council has taken adequate measures to maintain international peace and security” and reworded the proposal accordingly.¹⁴⁶

The final proposal, submitted and approved by the five permanent members, took this form: “Nothing in the present charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way effect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”¹⁴⁷

The change of the wording from “in the event of the Security Council failing to take the necessary steps to maintain or restore international peace and security” to “until the Security Council has taken the measures necessary to maintain international peace and security” was to emphasize that the inherent right of self-defence would remain, in the event that the Council failed to maintain peace and security and a member State suffered an armed attack.¹⁴⁸ It also seems that the later language was preferable in order to avoid the negative impression of the former phrase and to evade the definition of when the Council can be considered to have failed. Furthermore, to emphasize that the measures taken were based on a reserved right of Members

¹⁴⁵ Ibid, p 812

¹⁴⁶ Ibid. p 817

¹⁴⁷ Report of the Rapporteur of Committee III/4 to Commission III, *UNCIO Documents*, vol. 12, pp 680 & 737

¹⁴⁸ Alexandrov, note 2 *supra*, p 89

and not by virtue of a special exemption from Security Council authority over regional arrangements, it was also agreed, as proposed by the Soviet delegate, that the new paragraph should be inserted in the chapter on threats and breaches of peace and acts of aggression, rather than that on regional arrangements.¹⁴⁹

Section E: Major disputes regarding the interpretation of Article 51

Despite the extreme carefulness observed by the drafters of the Charter in the choosing the words and formulation of Article 51, still there are divisions among States and writers regarding its interpretation. These divisions are chiefly concentrated on three main questions. The first concerns interpretation of the phrase “until the Security Council has taken measures necessary” which determines when the defensive measures should be ceased: what measures taken by the Security Council could be considered sufficient to end the right of self-defence and who is competent to judge the efficacy of these measures. The second concerns the definition of the notion of “armed attack”: what act of aggression may be viewed as to amount to an armed attack justifying the use of force in self-defence. The most controversial question is whether the right of anticipatory or pre-emptive self-defence is lawful under the formula of self-defence envisaged in Article 51. This section highlights these questions and attempts to clarify the intention of the drafters in light of the drafting history examined in the preceding section.

E.1 “Until the Security Council has taken measures necessary to maintain...”

The drafting history and wording of Article 51 leave no doubt that the right of self-defence under Article 51 is intended to be subsidiary to and not a substitute for collective action by the Security Council.¹⁵⁰ It is to be a temporary right; a State under armed attack retains the inherent right to use force in order to defend itself until the Security Council is able to take action. The phrase

¹⁴⁹ Brownlie, note 128 *supra*, p 274

¹⁵⁰ Tucker, “The Interpretation of War Under Present International Law”, 4 *ILQ*, 1951, p 29; Bowett, note 3 *supra*, p 195; Simma, note 15 *supra*, p 804; Kelsen, note 99 *supra*, p 800

“until the Security Council has taken measures necessary to maintain international peace and security” illustrates this essentially provisional nature of action in self-defence under the Charter system; such a system presupposes that the right is necessary as an interim measure of protection, but that it should cease when the machinery of the centralized system itself operates as an effective protection of the individual members’ rights.¹⁵¹ This view is further endorsed by the fact that all members, in Article 24 (1), have conferred primary responsibility for the maintenance of international peace and security on the Security Council.¹⁵²

Although it is clear that the right of self-defence should cease when “the Security Council has taken measures necessary,” however, the questions arise, what measures taken by the Council can be considered sufficient enough to remove or suspend the right of self-defence and who is competent to judge the efficacy of these measures. Neither the language of Article 51 nor its *travaux préparatoires* gives a forthright answer to these questions. However, the unequivocal intention of the drafters was that the right of self-defence comes into operation only if the Security Council fails to take measures necessary to maintain peace and security. As shown above, this posture was stated in the draft proposals submitted by the Sponsoring Powers.¹⁵³ Furthermore, in discussion of the Soviet’s proposed text, the Soviet delegate explained that this phrase means that “if the Security Council did not maintain peace and security, countries would have the inherent right, individually or collectively, to take measures of self-defence up to the time the necessary measures by the Security Council [were] being taken.”¹⁵⁴ One American delegate questioned whether, if the Security Council took inadequate action such as merely

¹⁵¹ Bowett, *ibid*

¹⁵² Article 24 (1) outlines the Council mandate: “In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

¹⁵³ See the French Proposal, note 139 *supra*, the US Proposal, note 142 *supra*, the British Proposal, note 144 *supra*.

¹⁵⁴ *Foreign Relations*, 1945, p 812

calling for the severing of diplomatic relations, the right of self-defence would be justified.¹⁵⁵ The Soviet delegate replied that measures of self-defence “would be taken only after the Council had failed.”¹⁵⁶ As a result of this discussion, it was agreed that the inclusion of the word “necessary” or a similar word like “adequate” would be useful in clarifying the statement.¹⁵⁷ Furthermore, during the debate over the regional arrangements, Senator Vandenberg, the Chief of the US Delegation, stated that “As soon as the world Organization proves its effectiveness in guaranteeing security, we would accept the jurisdiction of the Security Council as exclusive.”¹⁵⁸ Although, no conclusive answer can be drawn from this discussion as to what constitutes “necessary measures,” however, two elements can be inferred: i) not every action taken by the Security Council may be considered sufficient to remove or suspend the right of self-defence but such an action should be effective; ii) the right of self-defence is permissible only when the Council is unable to act or the measures taken by it have patently failed to maintain international peace and security. In other words, unless it is evident that the Council has failed to address the seriousness of the situation—either by taking measures inadequate to maintain international peace and security or by being unable to deal with situation—the right of self-defence cannot be activated. Thus, the phrase “until the Security Council has taken measures necessary...” was not intended to mean that the Security Council has successfully reached the desired result, but rather that it has begun to take serious and effective measures to end the aggression. Even from a logical point of view, the effect of the measures taken by the Council should not be expected to prove fruitful immediately; time will be needed to achieve the goal. During this period, the right of self-defence should be halted and give way to the collective security system. In other words, the collective security system, the supreme technique for the use of force under the Charter,

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ Ibid. p 813

¹⁵⁸ Ibid. p 695

should be given full opportunity to operate; only when this system fails does the right of individual action emerge.

As to the question of who is competent to judge the effectiveness—or the failure—of “measures necessary”, although it is not expressly stated in any of the provisions of the Charter, a cautious reading of the interlocking provisions of Chapter VII indicates that the critical phrase, “measures necessary to maintain international peace and security,” which carries the same meaning in all other articles, inevitably leads to the conclusion that the judgment of the efficacy and adequacy of “measures necessary” rests only with the Council.¹⁵⁹ Ideally, of course, “both the SC and the defending State are able to reach their own decision on this.”¹⁶⁰ However, in case of disagreement, if the defending State decided that the measures taken are ineffective or inadequate and decided to take its own forces, it “admittedly runs the risk of its continued action being characterized as a “threat to the peace, breach of peace, of act of aggression” under Article 39.”¹⁶¹

E.2 The notion of armed attack and the Definition of Aggression

Another problem with the language of Article 51 is the term “armed attack.” Article 51 permits the use of force in self-defence “if an armed attack occurs”; however, the term “armed attack” has not been precisely defined in the UN Charter or any subsequent legal document.¹⁶²

According to the language of Article 51, the right of self-defence is only legitimate if Article 2(4) is breached in a way that takes the form of an armed attack.¹⁶³ Conversely, if the violation of the State’s interests is not in the form of an armed attack, the victim State will not be permitted to

¹⁵⁹ Chayes, A. “The Use of Force in the Persian Gulf” in Damrosch L.F. and Scheffer, D. J [eds.], *Law and Force in the New International Order*, Westview Press, UK. 1991, p 3-4

¹⁶⁰ Bowett, note 3 *supra*, p196

¹⁶¹ Ibid. See also Chapter 3, section B.2 for the academic debate on this point in the case of Kuwait crisis

¹⁶² It was noted by one American delegate that the idea of attack in the proposed Charter was “too vague.” He recalled that Germany had entered Poland at the beginning of the Second World War on the pretext that Poland attacked her. See *Foreign Relations*, 1945, p 665

¹⁶³ Bowett, note 3 *supra*, p 188

exercise the right of self-defence. Comparing the terminology used in the two provisions, it can be seen that armed attack is a much narrower notion than “threat or use of force.”¹⁶⁴ Thus, there are differences of scope between Articles 51 and 2(4) which mean that self-defence may not be applicable in the case of every use of force contrary to Article 2(4). Until an actual armed attack takes place, States are expected to refrain from forcible self-defence. Since the Security Council is given the supreme role within the Charter system of collective security and could respond to any degree of aggression, whether or not it reached the threshold of armed attack, all the affected State can do in that situation to ask the Council to rule that the violation of Article 2(4) is a breach of the peace and to decide measures under Articles 41 or 42. Not unless or until the prohibited use of force reaches the level of an armed attack can the affected State resort to the use of force in its defence.¹⁶⁵ This view is supported by the ICJ, which has explicitly pronounced that not every use of force is at once to be considered an armed attack justifying self-defence. The Court in the *Nicaragua* case stated that “[the Court] has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve the use of force.”¹⁶⁶

Since the term “armed attack” represents the key notion of the concept of self-defence pursuant to the exact words of Article 51, the pivotal question is what constitutes an “armed attack”? Defining this term decides how far unilateral force is still admissible. As mentioned above,¹⁶⁷ the drafters of the Charter decided not to attempt a detailed definition of aggression for the guidance of the Security Council and Members of the UN,¹⁶⁸ given the impossibility of an exhaustive

¹⁶⁴ Simma, note 15 *supra*, p 790

¹⁶⁵ Ibid

¹⁶⁶ *Nicaragua Judgement*, (ICJ Reports 1986), p 110, para 210

¹⁶⁷ Note 69 *supra*

¹⁶⁸ Goodrich and Hambro, note 35 *supra*, p 104

definition, since any omissions might be exploited by an aggressor or might delay action by the Council. Conversely, in the other cases listed, automatic action by the Council might bring about a premature application of enforcement measures. The Committee therefore left the entire decision as to determination of “a threat to peace, a breach of peace, or an act of aggression” to the judgment of the Security Council.¹⁶⁹

It is also difficult to find any clear answer to the question what constitutes “armed attack” in the drafting history of Article 51. Perhaps, the only constructive explanation was regarding the distinction between “attack” and “armed attack.” The word “armed” was inserted deliberately because the word “attack” alone was considered very broad and could be used to cover any kind of attack such as propaganda or non-military political efforts to overthrow the political institutions of one State. Therefore, the word “armed attack” was preferred as it confines the right of self-defence to the case of overt armed attack.¹⁷⁰

Accordingly, the UN Charter uses the terms “armed attack” and “aggression” in Articles 1(1), 39, 51 and 53, albeit without defining them anywhere.¹⁷¹ After many failed attempts by the UN to define these terms, in 1974, this undertaking came to an end when the General Assembly of the UN adopted the “Definition of Aggression” Resolution 3314 (XXIX). However, the “Definition of Aggression” determines the notion of “act of aggression” embodied in Article 39 of the Charter, rather than that of an “armed attack” as used in Article 51. This follows from paragraphs 2 and 4 of the Preamble, as well as from Article 6, under which the Definition does not contain any regulation of the right of self-defence in response to an armed attack. Furthermore, the *travaux préparatoires* of the Definition illustrate that a definition of armed attack was not intended. In the special committee that drafted the Definition, the United States,

¹⁶⁹ Report of Rapporteur of Committee III/3 to Commission III on Chapter VIII, Section B, *UNCIO Documents*, vol. 12, p 502-5

¹⁷⁰ *Foreign Relations*, 1945, p 667

¹⁷¹ Simma, note 15 *supra*, p 794

supported by other western States strongly opposed tendencies to include “armed attack.”¹⁷²

Like the Soviet Union, they also expressed the view that the notions of act of aggression and armed attack are not identical.¹⁷³

While an armed attack necessarily constitutes an aggression, the converse is not necessarily true; hence, the uncertainties regarding the scope and content of both terms. As noted previously, the concept of an armed attack has a narrower meaning than the phrase “use or threat of force” within the meaning of Article 2 (4). Whereas an armed attack always presupposes a violation of Article 2 (4), not all such violation constitutes an armed attack. The latter implies force on a relatively large scale and with substantial effect. For instance, mere frontier incidents, such as the incursion of an armed border patrol in another State’s territory, may well be characterized as a use of force contrary to Article 2(4), but hardly as an armed attack. This concept has been confirmed by the ICJ in the *Nicaragua* case.¹⁷⁴ Thus, the adoption of the definition of Aggression by the General Assembly did not constitute decisive progress in defining armed attack.¹⁷⁵ Furthermore, the *Nicaragua Judgment* by the ICJ did not produce any clarification in this respect. On the term ‘armed attack’, the ICJ simply remarked that “there appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks.”¹⁷⁶ Rather than offer a definition of the term, the Court contented itself with giving an illustrative example and stating that the notion not only comprises unspecified cross-border actions by regular forces, but also the participation of a State in the use of force by unofficial armed bands, as described in Article 3(g) of the Definition of aggression.¹⁷⁷

¹⁷² Statement made by the American Representative, in *UN Doc. A/AC. 134/SC.113, SC.105*, p. 17

¹⁷³ Statement made by the Soviet Representative, in *UN Doc. A/AC. 134/SC.113, SC.105*, p 16

¹⁷⁴ *Nicaragua Judgement*, ICJ Reports (1986), p 110, para 210

¹⁷⁵ Gray, C. *International law and the Use of Force*, second edition, Oxford University Press, Oxford, 2004, p 110

¹⁷⁶ *Nicaragua Judgement*, ICJ Reports (1986), p 103, para 195

¹⁷⁷ Ibid, see also Simma, note 15 *supra*, p 795

Despite this apparent ambiguity regarding the concept of armed attack, some guidelines can be drawn from the Definition of Aggression and the *Nicaragua judgement* as to what may constitute an “armed attack” for the purpose of Article 51 as follows;

(1) The Definition clearly distinguishes between direct and indirect application of the use of force. Acts of aggression described in Article 3(a) to (e) of the Definition of Aggression including “invasion or attack..., bombardment ..., blockade of the ports by a State against the territory of another State”, although not conclusive, involving direct and severe use of force, can be construed as armed attack, which would, *prima facie*, justify the victim in taking measures in self-defence under Article 51 of the Charter.¹⁷⁸

(2) Acts falling under Article 3(f) and (g) dealing with indirect force do not readily fall into the category of armed attack.¹⁷⁹ Nevertheless, the ICJ, in the *Nicaragua Judgment*, did not reject the view that the prohibition of armed attacks could apply to the sending by the State of armed bands to the territory of another State, if the scale and effects of that action were such that it would have been classified as an armed attack rather than a mere frontier incident, had it been carried out by regular armed forces.¹⁸⁰ Therefore, a State that is the victim of indirect aggression will be required to show that the acts it claims to have suffered from the attacker’s armed bands were sufficiently serious to amount to an armed attack.

(3) Some types of assistance to the private use of force such as the provision of weapons or logistical can be viewed as acts of aggression, but, according to the *Nicaragua Judgment*, it is not, *per se*, an armed attack within the meaning of Article 51 and so cannot give rise to a right to

¹⁷⁸ For similar view see Kaikobad, K.H, “Jus Ad Bellum: Legal Implications of the Iran-Iraq War”, in Dekker, I, F. and Harry, H.G.[eds] *The Gulf War of 1980-1988, The Iran-Iraq War in International Legal Perspective*, Martinus Nijhoff Publishers, the Hague, the Netherlands, 1992, p 59

¹⁷⁹ Ibid

¹⁸⁰ *Nicaragua Judgment*, ICJ Reports 1986, p 103, para 195; see also Chapter 7, section A.1

take action in self-defence.¹⁸¹ Thus, although for a State to assist rebels active in another State is unlawful use of force, however, the victim State cannot reply by using force in self-defence.¹⁸² This view was strongly criticized by commentators and seems to have been changed after the events of September 11 and the adoption of the legislative Security Council Resolution 1373 (2001.)¹⁸³

Apart from the notion of armed attack, it should be noted that the Definition is not binding on the Security Council for the purpose of enforcement action under Chapter VII. Article 39 gives the Security Council discretion, such that the Council may, in a given situation, identify acts, not listed in this Definition, as aggression, although it may take guidance from the Definition in its determination.

E.3 The right of anticipatory self-defence

The chief division with respect to the right of self-defence is regarding the right of anticipatory self-defence. On the one hand, some scholars argue the use of force in self-defence under the Charter system is limited to where an “armed attack occurs”, which in turn abolishes the right of States to anticipatory self-defence.¹⁸⁴ This view supports a strict interpretation of Article 51 and strongly rejects the notion of anticipatory self-defence, on the ground that it is a dangerous concept to imbue with legality, because it gives the victim State a wide discretion in initiation of force and encourages the disproportionate use of force. Moreover, the concept involves delicate and precise calculations of the movements of the opponent. For instance, a pre-emptive strike undertaken too early might constitute an act of aggression.¹⁸⁵ From this point of view, the

¹⁸¹ *Nicaragua Judgement*, (ICJ Reports 1986), p 104, para. 195 ; see also Briggs, H.W., “The International Court of Justice Lives Up to its Name”, 81 *AJIL*, 1987, p 83-4

¹⁸² Kaikobad, note 178 *supra*, p 60

¹⁸³ See Chapter 7, section A.1

¹⁸⁴ See, for example, Kelsen, note 99 *supra*, p 797; Brownlie, note 128 *supra*, p 275; Goodrich and Hambro, note 35 *supra*, p 107; Tucker, note 150 *supra*, p 29; Kunz, J. “Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations”, 41 *AJIL*, 1947, p 878

¹⁸⁵ Shaw, M. *International Law*, fourth edition, Cambridge University Press, Cambridge, 1997, p 790

following arguments have been put forward. First, the right of self defence is an exception from the general prohibition of threat or use of force in Article 2(4) of the United Nations Charter; Article 51 grants States the right of self-defence, individually or collectively, only if an armed attack occurs against a member State of the United Nations. Hence, the meaning of Article 51 is clear; the right of self defence is only permitted to States that are victims of an actual armed attack.¹⁸⁶ Second, the limits imposed on self defence in Article 51 would be meaningless if a wider customary international law right of self defence were to survive unfettered by these restrictions. In other words, Article 51 prohibits “preventive war”, since the “threat of aggression” does not justify self defence under Art. 51.¹⁸⁷

The opposing view calls for a wide right of self-defence that goes beyond the right to respond to an armed attack on a State’s territory. The major argument put forward by proponents of this view can be summarized as follows: first, Article 51 of the UN Charter, through its reference to the “inherent” right of self defence, preserves the earlier customary international law right of self defence which has been always anticipatory. Nevertheless, it was not embodied in the UN Charter.¹⁸⁸ The Charter, however, does not take away pre-existing rights of States without express provision.¹⁸⁹ Second, at the time of the conclusion of the Charter there was a wide customary international law right of self-defence, allowing anticipatory self-defence.¹⁹⁰ Thirdly, to deny a State the right of taking pre-emptive action when there is an imminent danger of an attack appears to be equivalent to an acceptance that the victim may be destroyed, in whole or in part, before it can exercise its right to self defence.¹⁹¹ Thus, Article 51 protects “the aggressor’s

¹⁸⁶ Brownlie, note 128 *supra*, p 275

¹⁸⁷ Kunz, “Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations”, note 184 *supra*, p 878

¹⁸⁸ Bowett, note 3 *supra*, p 188-89

¹⁸⁹ Gray, note 175 *supra*, p 98

¹⁹⁰ McCoubrey, H. and. White, N. *International Law and Armed Conflict*, Dartmouth, England, 1992, p 91

¹⁹¹ *Ibid.* p 94; Bowett, note 3 *supra*, p 191-2

right to the first stroke.”¹⁹² Fourthly, Article 51 is subject to the customary law, which permits anticipatory self-defence. Consequently, there is no necessity to consider the interpretation of the exact words of Article 51, because the customary right still exists for member States of the UN.¹⁹³ Holders of this wide interpretation point to modern weaponry, such as weapons of mass destruction, which can be fired from very long distances with tremendous speed and may not allow the target State enough time to act in response to the attack, especially if the target State is geographically small.¹⁹⁴ Therefore, they argue that States must be authorized to launch pre-emptive strikes against imminent threat; otherwise they would be destroyed before they can exercise their right to self-defence.¹⁹⁵

Indeed, the natural and ordinary meaning of the word “occurs” in Article 51 indicates that the right of self-defence is only permissible after the victim State has been subjected to an “armed attack.” Thus, the plain language of this article the right of self-defence may not be anticipatory but must be in response to an actual armed attack. However, this wording of Article 51 is inconsistent with the intention of the drafters of the Charter. The drafting history of this article clearly indicates that the drafters’ intention was to preserve the inherent right of self-defence as it was before the adoption of the Charter, including the right of anticipatory self defence. The course of debate signifies that there was no intention to alter or limit the substance of this right, except for the procedural obligations such as the reporting duty and the cessation of defensive measures once the Council has taken the “necessary measures.” This presupposes that the right of self-defence includes the right of anticipatory self-defence in case of imminent danger. The word “inherent” enhances this proposition. It indicates that the right of self-defence envisaged under Article 51 is the same natural right of self-defence as under the naturalist doctrine, which

¹⁹² Brownlie, note 128 *supra*, p 276

¹⁹³ Ibid

¹⁹⁴ Shaw, note 185 *supra*, p 789; McCoubrey and White, note 190 *supra*, p 91

¹⁹⁵ McCoubrey and White, *ibid*

permits forestalling an act of violence threatening a State from a distance.¹⁹⁶ Indeed, as the ICJ noted in *Nicaragua* case: “Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.”¹⁹⁷

Furthermore, there was no discussion over the term “occurs” in the records of San Francisco Conference and nothing is said in any of drafting documents to suggest that this term has been deliberately chosen. On the contrary, the drafting history shows that this word was of a little, if any, significance. Indeed, the final proposals of Article 51 submitted by France and the UK and some of the US proposals, did not contain such a word. This would mean that the word “occurs” was accidentally inserted in the final text and, hence, there was no premeditated intention to limit the right of self-defence to the case of actual attack. Significantly, the major concern of the US was to preserve its right to take defensive measures under the inter-American system established by the Act of Chapultepec without Security Council authorization. The course of debate clearly demonstrates that the pattern of the right of self-defence the US had in mind was the one established by this treaty and considerable efforts was made by the US to mention the Act of

¹⁹⁶ Under the ‘just war’ doctrine, self-defence was viewed as permissible against immanent danger, just as it is against an assault already perpetrated. Forestalling an act of violence threatening a State from a distance was not only acceptable but also a duty upon the State. Grotius, for example, pointed out that just actions lie “either for wrongs not yet committed, or for wrongs already done. An action lies for wrong not yet committed in cases where a guarantee is sought against a threatened wrong, or security against anticipated injury, or an interdict of different sort against the use of violence.” And “it is permissible to forestall an act of violence which is not immediate, but which is seen to be threatening from a distance; not directly... but indirectly, by inflicting punishment for a wrong action commenced but not yet carried through.” Grotius, H, *De Jure Belli Ac Pacis Libri*, Book II, (translation by Francis W. Kelsey) and Introduction by James Brown Scott, Wildy & Sons LTD. London, reprinted 1964, pp 171 and 184. Similarly, Wolff stated that “[a] just cause of war between nations arises only when a wrong has been done or is likely to be done.” Wolff, C. *Jus Gentium Methodo Scientifica Pertractatum*, vol II, (translation by Joseph Drake), *Classics of International Law*, James Brown Scott [ed.], Wildy & Sons Ltd, London, Reproduction of the edition of 1764, Reprinted 1964, p 314

¹⁹⁷ *Nicaragua case*, ICJ Reports 1986, p 94, para.176

Chapultepec as an example of the right of collective self-defence. Therefore, it is worth looking at the right of self-defence under the Act of Chapultepec.

Article 4 of this treaty expressly allows defensive measures against predictable aggression. It states that “in case acts of aggression occur or there may be reasons to believe that an aggression is being prepared by any other State against the integrity and inviolability of the territory, or against the sovereignty or political independence of an American State, the States signatory to this Act will consult amongst themselves in order to agree upon the measures it may be advisable to take.”¹⁹⁸ Article 5 also set forth that “the signatories of this Act recognize that such threats and acts of aggression” may necessitate defensive action including the “use of armed force to prevent or repel aggression.”¹⁹⁹ Thus, under this Act the US and the Latin American States are allowed to take pre-emptive action against imminent threats. If there was any intention to abolish this right under the UN Charter, certainly, the US would have opposed such a proposal because there would be contradiction between the Act and the proposed Charter, the former permitting actions that were prohibited by the latter. On the contrary, it is perfectly clear that the US and the Latin American States intended to include in the Charter a provision of the right of self-defence, similar to the one under this Act.

This understanding is enhanced by the opinion expressed by some American delegates in the preparation work. During the discussion, Representative Mcloy asked “supposing Germany sent a fleet into the waters off Argentina, would it be illegal if we shot across the German bows when they attempt to land in Argentina?” Representative Pasvolsky replied, “We could act, and the Security Council would then be in position to review our action, asking us what we were trying

¹⁹⁸ Article 4 of the Act of Chapultepec, 3 March, 1945, available at <http://www.ibiblio.org/pha/policy/1945/450303a.html>

¹⁹⁹ Ibid

to do.”²⁰⁰ This answer seemed satisfactory for all other delegates. It can be inferred from this discussion that the pattern of the right of self-defence the American delegation had in mind was not only that defensive action should be taken after the attack had occurred but also that it could be taken to prevent imminent attack.

As to the argument that anticipatory self-defence is not permissible because the “threat of aggression” does not justify self defence under Article 51,²⁰¹ this argument is misleading. A mere threat of using force is much less serious than a situation where a State has decidedly committed itself to launch a large-scale armed attack and earnestly taken the final steps to do so. This latter certainly comes under the notion of self-defence, as Waldock rightly argued “where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.”²⁰² To conclude, despite the word “occurs”, a strong argument can be made that the right of self-defence permitted under Article 51 is the same right that exists under customary law, including the right of anticipatory self-defence in case of imminent danger. This interpretation is also compatible with State practice.²⁰³

Conclusion

The concept of self-preservation is recognized in every legal system, although the purpose and scope of that right may vary from one system to another. In the absence of any powerful central authority for the enforcement of the law and the protection of the rights of individuals, or where the central authority is unable speedily and effectively to secure individuals’ rights, it is clearly

²⁰⁰ *Foreign Relations*, 1945, p 592

²⁰¹ Kunz, “Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations”, note 184 *supra*, p 878

²⁰² Waldock, note 3 *supra*, p 498. Similarly, McCoubrey argued that “It can safely be said that the armed attack has occurred right after the attacker State has obviously committed itself to launch the attack; the condition is the subsistent of the launch of the missiles not revealed by just the preparations for war, in other words, once the firing of the missiles has been irretrievably begun.” McCoubrey and White, note 190 *supra*, p 91

²⁰³ See Chapter 7, section C for discussion on the criteria of anticipatory self-defence and State practice.

necessary to allow individuals whose rights are threatened, to take action in their own defence. In more mature and effective legal systems, however, the duty of protection tends to be entrusted to a centralized authority and constraints are imposed on the right of unilateral action by individuals.²⁰⁴ The same concept applies to the world community. When there is no powerful and effective international authority for the enforcement of the law and the protection of the rights of individual States, the right of a State to protect its self-interest cannot be denied.

Prior to the creation of the UN Charter this powerful central authority did not exist. As a corollary, no prohibition of the use of force by States existed; States had the right to wage war to protect their interests, and at their own sovereign discretion. The attempts were made to limit the States' freedom to wage war by making war in general only a subsidiary means of settling international conflicts did not, in fact, abolish war as an instrument of national policy; war remained as a legal institution in principle.

With the adoption of the Charter, this framework has been permanently changed. The Charter has created a new international world order, a new international law, in which war, as a method of self-help, was replaced by organized and peaceful methods of settling international disputes and a mechanism for enforcing this settlement in the name of the community and, if necessary, a power to take sanctions against the disobedient member of the international community. The only exception to the general ban on the unilateral use of force in international relations is the right of individual or collective self-defence. Apart from this right, all forms of unilateral use of force in self-help such as reprisal or redress, which were permitted previously, are absolutely prohibited under the Charter system. Even the right of self-defence has been regulated under the Charter system. Article 51 permits self-defence only in case of armed attack—not any other form of aggression short of an armed attack. It also limited the duration of this right by establishing

²⁰⁴ Bowett, note 3 *supra*, p 3

that defensive measures should be ceased once the Security Council “has taken measures necessary to maintain international peace and security.” Furthermore, Article 51 imposed an obligation on the defending State to report its defensive measures immediately to the Council.

It is interesting, however, that some modern writers are attempting to escape this new world order by calling for the revival of the doctrine of just war, arguing that it is needed nowadays to face tyrannical regimes that violate human rights and threaten international peace and security. They argue that intervention against authoritarian regimes to endorse human values and to eliminate the threats these regimes pose to the world’s peace is just, legitimate and consistent with contemporary international law requirements regarding the legitimate use of force.²⁰⁵ This trend acquired momentum in the context of the Iraq war in 2003. According to this school of thought, the reasons forwarded by the US and the UK for the war were “just causes” and therefore the invasion of Iraq and the overthrow of Saddam Hussein’s regime were “just”.

This view, however, cannot be accepted under positive international law. The *bellum justum* doctrine has been discredited and replaced by *bellum legale*, which narrows the justification for the use of force in international relations to several legally recognized and more precisely defined notions. Therefore, whether or not the use of force against Iraq in 2003 was “just”, is immaterial from the legal point of view. In other words, the question of the justice of the war falls outside the pale of positive law. Today, it is not enough to describe use of force as “just” for it to be legally acceptable and justifiable under positive international law.

²⁰⁵ See generally Wingfield, T. “The Convergence of Traditional Theory and Modern Reality: Just War Doctrine and Tyrannical Regimes”, 2 *Ave Maria Law Review*, 2004, p 93; Falvey, J. “Our Cause Is Just: An Analysis of Operation Iraqi Freedom Under International Law and the Just War Doctrine, 2 *Ave Maria Law Review*, 2004, p 65; Weigel, G. “Pope John XXIII Lecture: The Just War Tradition and the World After September 11,” 51 *Cath. U.L. Review*, 2002, p 689; Raines, J. “Osama, Augustine, and Assassination: the Just War Doctrine and Targeted Killings, 12 *Transnational Law & Contemporary Problems*, 2002, p217

Chapter 2

Iran-Iraq War: A War of Aggression

Introduction

Saddam Hussein's regime in Baghdad revealed itself as an aggressive regime that violates international law and displays a distorted attitude towards the international world order, only a little more than one year after it came to power on July 16, 1979. The invasion of Iran on September 1980 was a clear example of a war of aggression motivated by territorial ambitions. Indeed, by attacking Iran on such a large scale, Iraq violated the general ban on the use of force. Significantly, during the course of hostilities, Iraq's frequent deployment of chemical weapons agents against Iranian military personnel and civilians constituted a flagrant breach of the fundamental principles of humanitarian law.

The effects of these violations were not transitory, but had long term implications. The Iran-Iraq war, in fact, permanently altered the course of Iraqi political and legal history and led to severe deterioration of the reputation of the regime headed by Saddam Hussein. It also raised concerns among the world community regarding the dangerous consequences of allowing such a rogue regime to possess WMDs, especially in light of its pursuing nuclear weapons. Thus, the Iran-Iraq war was the precursor of developments that eventually led to the U.S.—led coalition against Iraq in March 2003 and the overthrow of the Iraqi regime. From another perspective, the mediatory approach to the war taken by the Council, coupled with third-States' ambiguous attitude and their clear bias to the Iraqi side during the Tanker War, significantly contributed to Saddam's expectation that he could invade Kuwait with impunity. Therefore, the Iraqi experience and attitude in the war with Iran need to be understood, for full understanding of the invasion of

Kuwait in August 1990 and the consequences triggered by that crisis, up until the invasion of Iraq in 2003 by the American-led coalition.

This chapter, therefore, examines the Iran-Iraq war. The first section analyses the origins of the conflict and the legal justifications put forward by Iraq for the invasion. These justifications include Iraq's accusation for Iran of breaches of the Algiers Treaty concluded between the two States in 1975, the allegations of Iranian direct and indirect attacks against Iraq and the right of self-defence against imminent Iranian attack. The second section underlines the poor showing of the Security Council and its failure to take "measures necessary to maintain international peace and security". Finally it highlights the ambiguous reaction of the world community to the war, in general, and to the Tanker War, in particular.

Section A: Dimensions and legal justifications for the Iran-Iraq War

The Iran-Iraq war had several dimensions, including border disputes, religious differences and political tensions. However, two main factors were ostensibly the trigger for hostilities. The first was the historic territorial disputes over the Shatt-al-Arab waterway. The second was the frequent attempts by the Islamic leaders of Iran to incite revolts by adherents of the majority Shiite sect throughout Iraq against Saddam and the Sunni-dominated Ba'ath government of Iraq. Consequently, in the Iraqi perception, Iran's Islamic agenda threatened its regime, as well as Iraq's delicate Sunni-Shiite balance. Other contributory factors which exacerbated the situation included the ancient Sunni versus-Shiite and Arab-versus-Persian religious and ethnic disputes, and the personal animosity between Saddam Hussein and Ayatollah Khomeini.¹ Thus, from one perspective, the Iran-Iraq War could be seen as just another episode in the ancient Persian-Arab conflict, given a new dimension by twentieth-century border disputes.

In light of these concerns, the war, initiated by Iraq on 22 September, 1980, was intended to address a series of interrelated objectives. Iraq's war aims were to regain control of the whole of the Shatt al Arab, although Iraq had agreed to abandon this claim beforehand in the 1975 Algiers Treaty.² But, most importantly, the war was intended to ease the threat to its internal security posed by the Iranian regime, more precisely, to secure Saddam Hussein's regime and the Ba'ath's control over Iraq. This latter factor also touched Iraq both in its claim to be the protector of the other Arab states in the area and to increase Iraqi power and prestige in the Arab-World, especially in the light of Egypt's isolation subsequent to the Camp David peace accord with

¹ See generally Wright, C. "Implications of the Iraq-Iran War", 59 *Foreign Affairs*, 1980-81; Amin, S.H, "The Iran-Iraq Conflict: Legal Implications", 31 *ICLQ*, 1982; Mottale, M. *The Origins of the Gulf Wars*, University Press of America, Oxford, 2001, p118-22; Weisburd, M. *Use of Force: The Practice of States Since World War II*, Pennsylvania State University Press, Pennsylvania, 1997, p 47-52; Marr, P. "The Iran-Iraq War: The View from Iraq", in Christopher Joyner [ed.], *The Persian Gulf War: Lessons for Strategy, Law, and Diplomacy*, Greenwood Press, London, 1990, p 59-64. See also History of Iran-Iraq War 1980-1988, available at <http://www.iranchamber.com/history/iran_iraq_war1.php>

² Weisburd, *ibid*, p 47

Israel. Additionally, it has been reported that Iraq also hoped to seize the western Iranian region of Khuzestan, an area known for its extensive oil fields.³

To justify its invasion of Iranian territory, Iraq claimed that Iran was in violation of the 1975 Algiers agreement, having failed to hand over certain territory as stipulated in that agreement. Iraq's contention was that it was using force in order to regain sovereignty over the whole of its territory, that is, over the portion of the Shatt conceded to Iran in 1975.⁴ Iraq also accused Iran of carrying out a sabotage campaign against it which constituted a threat to the Iraqi national security.⁵ Soon after, Iraq added to its justifications the claim that Iran had commenced hostilities and undertaken substantial military actions against Iraq prior to the Iraqi invasion to Iran on 22 September.⁶ The following parts of this section will examine each of Iraq's justifications.

A.1 Claims of self-defence for the restoration of the territorial status quo as a sequence of Iran's violation of the Baghdad Treaty

The Algiers Accord,⁷ concluded by the two States in 1975, consisted of the June 1975 Treaty of Baghdad and three Protocols concerning the land frontier, the river frontier, and military and security matters. Wherein Iran pledged to refrain from providing further assistance to Kurdish insurgents then holding sway in the mountains of northern Iraq and to close its border to them in return for Iraq's abandonment of its claim to the whole of the Shatt al Arab waterway and agreed to set the boundary in the middle of the Shatt. It has been noted that Iraq, although it ratified the Treaty, was not fully satisfied with it, since the Shatt is its principal outlet to the sea.

³ Mottale, note 1 *supra*, p 119-20

⁴ Weller, M. "Comments: The Use of Force and Collective Security" in Dekker, I. F. and Harry, H.G. [eds], *The Gulf War of 1980-1988, The Iran-Iraq War in International Legal Perspective*, Martinus Nijhoff Publishers, the Hague, the Netherlands, 1992, p 72

⁵ Kaikobad, K.H, "Jus Ad Bellum: Legal Implications of the Iran-Iraq War" in Dekker and Harry, *ibid*, p 52-3

⁶ Letter annexed to a letter dated 27 of October 1980 from the Representative of Iraq to the United Nations to the Secretary-General. *UN Doc. S/14236*

⁷ Algiers Accord of 6 March 1975 was the provisional agreement between the two States wherein they pledged to carry out final delineation of their land and river boundaries and restore security along their joint borders, available at <<http://www.mideastweb.org/algiersaccord.htm>>

On 17 September 1980— five days before the date that is usually taken as the beginning of the Iran-Iraq War — the Government of Iraq announced that the June 1975 Treaty of Baghdad (and its Protocols) and the four additional Treaties of December 1975 were null and void.⁸ After the outbreak of the hostilities, Iraq, in a letter to the UN Secretary-General, stated that “...there is no longer any border agreement between the two countries with the exception of the Protocol for the Delimitation of the Turco-Persian Frontiers signed in 1913, the views of Iran and Iraq regarding that Protocol notwithstanding.”⁹ Iraq proclaimed that its decision was caused by “... their violation by the Government of the Islamic Republic of Iran by word and deed...”¹⁰

Iran’s alleged violations concerned two of the Protocols annexed to the Baghdad Treaty. First, it was alleged that Iran had failed to honour its obligations under the “Land Frontier” Protocol by postponing arrangements for the return to Iraq of territory which Iran had occupied unlawfully.¹¹ Second, Iran had allowed Kurdish leaders and their supporters to enter and had also permitted their activity within Iraq, contrary to the intention of the “Security” Protocol.¹² The Iraqi Government, however, did not explicitly attribute its denunciation of the Treaty system to these supposed breaches. Instead, it accused Iran of general and persistent breaches of essential elements of the “Security” Protocol.¹³ Iraq took the view that the Algiers agreement and the

⁸ On 17 September, 1980, President Saddam Hussein explained his decision to abrogate the Algiers Treaty in an address before the Iraq National Assembly; he stated that “Since the rulers of Iran have violated this agreement as of the beginning of their reign by blatantly and deliberately intervening in Iraq’s domestic affairs..., and by refusing to return Iraqi territories, I announce before you that we consider the 6 March 1975 agreement as abrogated from our side...., Thus, the legal relationship concerning Shatt-al-Arab should return to what it was before 6 of March 1975. The Shatt shall again be, as it has been throughout history, Iraqi and Arab in name and reality, with all rights of full sovereignty over it.” Foreign Broadcasting Information Service, Middle East and North Africa, 5, no 183, September 20, 1980 [Hereinafter Saddam Hussein’s Address]

⁹ Letter to the Secretary-General of the United Nations dated 27 October 1980. *UN Doc. S/14236*

¹⁰ A Note dated 17 September 1980 from the Iraqi Minister of Foreign Affairs to the Iranian Embassy in Baghdad. *UN Doc. S/14272*, Annex 1

¹¹ *Saddam Hussein’s Address*, note 8 *supra*

¹² Letter from the Iraqi Representative to the Secretary-General of the United Nations dated 20 June, 1980, *UN Doc. S/14020*; see also Weller, note 4 *supra*, p 72

¹³ In a Note dated 16 November 1980 from the Iraqi Minister of Foreign Affairs to the Iranian Embassy in Baghdad, Iraq stated that the “escalation of Iranian aggression against Iraq by launching of an undeclared war

Baghdad Treaty with its Protocols and Annexes constituted an integrated and indivisible whole, such that a breach of any part would render the whole null and void.¹⁴ This view was based on Article 4 of the Baghdad Treaty, which states that the provisions of the Treaty—including the three Protocols and the annexes thereto—are an “integral part... [which] shall not be infringed under any circumstances and shall constitute the indivisible elements of an over-all settlement. Accordingly, a breach of any of the components of this over-all settlement shall clearly be incompatible with the spirit of the Algiers Agreement.”¹⁵ Thus, in Iraq’s view, it was sufficient to claim that the Iranian activities together constituted a violation of this article which, in turn, rendered the whole Treaty null and void. As a consequence of the termination of the boundary agreement, Iraq claimed that its invasion of Iran was undertaken “in exercise of self-defence of the purpose of restoring Iraq’s sovereignty over the totality of its territory.”¹⁶ The totality of Iraqi territory was defined as all “land and water territories in Shatt-al-Arab, as was the case before the Algiers agreement.”¹⁷

Iran, on the other hand, made it quite clear that it never intended to open the door for denunciation in the Treaty of Baghdad. In its first communications to the Security Council after the outbreak of hostilities, Iran insisted that it had not terminated the Treaty and pointed out that the Baghdad Treaty, far from allowing unilateral termination, expressly prohibited it.¹⁸ In Iran’s view, therefore, all the agreements that Iraq claimed were null and void, were still in force and binding and any dispute arising regarding their application should be resolved in accordance with

against frontier posts, the shelling of Iraqi towns and interference in the internal affairs of Iraq is cogent proof of Iran’s clear refusal to be bound by the aforementioned treaty.” *UN Doc. S/14272*, Annex 2

¹⁴ Post, H. “Border Conflicts Between Iran and Iraq: Review and Legal Reflections” in Dekker and Harry, note 4 *supra*, p 29

¹⁵ Article 4 of the 1975 Baghdad Treaty, available at <<http://www.meij.or.jp/text/border/Iran-Iraq/iraqiran1975.htm>>

¹⁶ SCOR, 2251st meeting, 35th Year, para 60

¹⁷ *Ibid*, para 59

¹⁸ *UN Doc. S/14249*

Article 6 of the Baghdad Treaty, which contained a conclusive settlement of disputes procedure.¹⁹

Iraq's argument, on the face of it, is fundamentally flawed. However serious Iran's violations were, these breaches cannot be invoked to abrogate a treaty establishes boundaries or have a territorial nature such as the Baghdad Treaty. This kind of treaty, under the general rules of international law and, in particular, Article 62 of the Vienna Convention,²⁰ has a special status and is protected against unilateral denunciation, even if there is a fundamental change of circumstances. As Post rightly argues, these treaties, under contemporary international law, are subject to the so-called "the doctrine of continuity and finality boundaries."²¹ Therefore, the justification presented by Iraq that it used force to regain its sovereignty over the whole Shatt-Al-Arab waterway cannot be considered as a valid basis for the use of force. In fact, by this argument Iraq acknowledged that it was using force to pursue territorial claims, clearly contravening the Charter prohibition of the use of force in international relations except in case of self-defence against armed attack. In addition, by using force to settle its boundary dispute with Iran, Iraq violated the obligation of UN Members to settle their disputes in peaceful means as Article 2(3) of the UN Charter requires.²²

¹⁹ Article 6 of the Baghdad Treaty enumerates the detailed procedures to be followed in case of differences between the two contracting States over the interpretation and the application of the treaty, namely, direct bilateral negotiation between the parties. In case of non-agreement, the parties have to resort within the period of three months to the good offices of a third friendly State. If one of the parties refuses to resort to the good offices or the good offices fail within a period not exceeding one month beginning from the date of refusal or failure, the disagreement will be solved by arbitration. If the parties disagree on the procedure of arbitration, any one of them can resort within fifteen days following the date of disagreement to an arbitration tribunal. Article 6 of the 1975 Baghdad Treaty, *available at* <<http://www.meij.or.jp/text/border/Iran-Iraq/iraqiran1975.htm>>

²⁰ Article 62 (2) of the Vienna Convention declares that "a fundamental change of circumstance may not be invoked as a ground for terminating or withdrawing from a treaty; (a) if the treaty established a boundary..."

²¹ Post, note 14 *supra*, p 30

²² Article 2(3) states that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

A.2 Claims of self-defence against Iran's direct and indirect attacks

In the first letters to the United Nations with regard to the conflict, Iraq characterized its invasion of Iran as an exercise of the right of self-defence rendered necessary by circumstance.²³ The justifications presented in these letters were centered on the Iranian breaches of the Algiers Accord, discussed above. Iraq also accused Iranian agents of bomb attacks, terrorist actions and sabotage in Iraqi territory, and of supporting Kurdish rebels, and encouraging instability amongst the Kurdish people, in order to instigate an insurgence against the Ba'ath government of Iraq.²⁴ It thereby claimed that the invasion was an exercise of the right of self-defence. One month later, in a letter dated 24 October 1980 to the Secretary-General, Iraq added to its previous justifications alleged substantial military actions by Iran against Iraq, prior to the Iraqi invasion of Iran on 22 September.²⁵ Iran was alleged to have shelled Iraqi towns on 4 September 1980, and the beginning of war was now traced to this date. Contradicting this claim, however, Iraq described 22 September as the day "on which Iraq exercised the right of preventive self-defence to defend its people and territories."²⁶

Thus, besides the Iran's violations for the Algiers Treaty, Iraq sought to justify its use of force against Iran on three other legal grounds as follows: first, the right of self-defence against Iran's indirect use of force; second, the right of self-defence against Iran's direct use of force by shelling Iraqi border towns; third, the right of preventive self-defence against Iran's imminent attack.

²³ See Letters dated 21 and 24 September 1980 from the Minister of Foreign Affairs of Iraq to the Secretary-General and the President of the Security Council, *UN Doc. S/14191* and *S/14192*

²⁴ Ibid, see also Letter dated 21 September, 1980 from the Iraqi Representative to the Secretary-General, *UN Doc. S/14020* and *UN Doc. S/PV 2250*

²⁵ This letter was annexed to a letter dated 27 of October 1980 from the Representative of Iraq to the United Nations to the Secretary-General. *UN Doc. S/14236*

²⁶ Ibid. See also Dekker, I. "Criminal Responsibility and the Gulf War of 1980-1988: the Crime of Aggression" in Dekker and Harry [eds], note 4 *supra*, p 256

A.2.1 Self-defence against indirect use of force and assistance of insurgents

Iraq's claim of self-defence against indirect use of force by Iran consisted of two different categories of accusations: i) providing assistance to Kurdish insurgents and fomenting civil strife in Iraq; and ii) sending into Iraq armed bands who perpetrated acts of terrorism and sabotage in the sense that these bands were nearly that of *de facto* Iranian State organs.

As to Iraq's allegation that Iran supported Iraqi rebels and fomented civil strife, while Iran would clearly be in breach of Article 2(4), none of these would justify Iraq in taking forcible action in self-defence, because the condition of an armed attack as required under Article 51 was not met. Such assistance, according to the ICJ, does not amount to an armed attack in the sense of Article 51;²⁷ consequently, Article 51 provides no remedy for this situation. Thus, this allegation alone cannot be considered as a valid legal justification for the use of force by Iraq.

Regarding the second line of accusations, as illustrated in the preceding chapter, acts falling under Articles 3(f) and (g) of the Definition of Aggression dealing with indirect force cannot readily be classified as armed attack. Nevertheless, according to the ICJ, these acts may amount to armed attack if on a sufficiently large scale and having substantial effect.²⁸ Accordingly, for Iraq to claim that it was a victim of indirect aggression it would be required to show that the acts it claimed to have suffered from Iran's armed bands were sufficiently substantial in terms of scale and effects to amount to an armed attack. In view of Iraq's evidence against Iran, it appears likely that Iran at one time or another had been guilty of individual instances of use of force against Iraq.²⁹ Consequently, if these Iranian attacks were sufficiently substantial in terms of scale and effects, it seems that the use of force by Iraq in response was legitimate.

²⁷ See Chapter 1, section E.2 and Chapter 7, section A.1

²⁸ Ibid

²⁹ Kaikobad, note 5 *supra*, p 59-60; see also note 33 *infra*

In fact, however, most observers and commentators have viewed Iraq's invasion of Iran as unlawful and a clear violation of the UN Charter. This view was based mainly on the facts of the matter and the proportionality of the Iraqi action.³⁰ From the documentary evidence, it appears that Iraq's allegations against Iran of bombings, the poisoning of water supplies, supporting Iraqi rebels, fomenting civil strife and other such events were certainly exaggerated. Even if these alleged provocations by Iran were true and severe enough to constitute an armed attack, Iraq's response by such a large-scale military action, invasion and occupation of the Iranian territory was extremely excessive.³¹

Against this view, one may argue that even though the alleged Iranian provocations were of a far lesser scale than those mounted by Iraq, however, they did constitute actual aggression on the part of Iran and the Iraqi invasion was a genuine response to the danger perceived by Iraq. Therefore, Iraq was responding to an "accumulation of events" by countering multiple small-scale attacks with a single decisive blow.³² In this connection, consideration should be given to at least fifty-seven alleged Iranian violations of Iraqi airspace between February 1979 and May 1980; one hundred and eighty-seven border incidents between June and September 1980; and fifteen cases of intensive bombardment between August 1979 and June 1980.³³ Viewed from that perspective, the Iraqi action may not necessarily be excessive. However, the facts show that on 22 September 1980 Iraq initiated a large scale military action against Iran along a 300 mile front, bombing and destructing the Iranian oil installations, and within a week had occupied a large part

³⁰ Dekker, note 26 *supra*, p 256; Weller, note 4 *supra*, p 72; Kaikobad, note 5 *supra*, p 65; Kalshoven, F. "Prohibition or Restrictions on the Use of Methods or Means of Warfare", in Dekker and Harry [eds], note 4 *supra*, p 101; Lagoni, R. "Comments: Methods or Means of Warfare, Reprisals, and the Principle of Proportionality", in Dekker and Harry [eds], *ibid*, p 121-2; Baktiari, B. "International Law: Observations and Violations", in Rajaei, F. [ed.], *The Iran-Iraq War, The Politics of Aggression*, University Press of Florida, Gainesville, 1993, p 159

³¹ Kaikobad, *ibid*, p 60

³² *Ibid*, p 65

³³ *UN Doc. S/PV 2250*

of Iranian territory.³⁴ Such a large-scale action cannot be seen as proportional to the actions of which Iran was accused. Most importantly, Iraq's use of prohibited means of warfare was a pivotal aspect of disproportionality. Iraq was reported, on many occasions during the war, to have used chemical agents in various sectors of the front, caused the deaths, not only of many Iranian military personnel³⁵ but also of civilians.³⁶ Although Iran responded in kind towards the end of the war, Iraq was the first, and for a long time the only belligerent to employ such weapons³⁷ and, therefore, bears most of the blame for their use.³⁸

To conclude, the great disproportion in the action of the two parties invalidates Iraq's claim of self-defence against the alleged Iranian sabotage campaign. It seems that Iraq itself was aware of this; therefore, it apparently sought to enhance its legal position by adding more justifications for the war.

A.2.2 Self-defence against direct use of force

As mentioned above,³⁹ Iraq, one month after the outbreak of the hostilities, added to its justification for the war the claim that Iran was responsible for commencing the hostilities by shelling Iraqi border towns on 4 September 1980. Bombardment or shelling as an act of

³⁴ Amin, note 1 *supra*, p 179

³⁵ For example, in a Presidential statement of 25 April 1985, the President of the Council specifies that chemical weapons have been used "against Iranian soldiers" *UN Doc. S/17130*. Similarly, on 21 March 1986, the President of the Security Council stated that "chemical weapons on many occasions have been used by Iraqi forces against Iranian forces." *UN Doc. S/17932*

³⁶ The President of the Council, in Presidential statement on 14 May 1987 stated that "civilians in Iran also have been injured by chemical weapons." *UN Doc. S/18863*

³⁷ Kalshoven, note 30 *supra*, p 101

³⁸ During the course of 8 years hostilities, the President of the Security Council and the Council itself frequently reminded both belligerents of the need to abide strictly by the provisions of the Gas Protocol of 1925. See *UN Doc. S/16454* of 30 March 1984; *UN Doc. S/17130* of 25 April 1985; *UN Doc. S/17932* of 21 March 1986; *UN Doc. S/18863* of 14 May 1987; SC Resolution 598 of 20 July 1987; SC Resolution 612 of 9 May 1988; SC Resolution 620 of 26 August 1988. All these statements and resolutions were based on the findings of specialists dispatched by the Secretary-General to investigate allegations (mostly by Iran) that chemical weapons had been used. See Specialist Reports of 20 June, 1983 and 26 March, 1984, *UN Doc. S/15834* and *UN Doc. S/16433*. Both Reports confirmed that tabun and mustard gases had been used. See also *UN Doc. S/17127* of 24 April, 1985; *UN Doc. S/17911* of 1 March 1986; *UN Doc. S/18852* of 8 May, 1987; *UN Doc. S/19823* of 25 April, 1988. Some of these reports confirmed that both sides had used chemical weapons.

³⁹ Note 25 *supra*

aggression, described in Article 3(b) of the Definition of Aggression, can easily be regarded as an armed attack for the purpose of Article 51. However, whether or not the initial act of self-defence was carried out in response to an armed attack is essentially a matter of fact, to be demonstrated by evidence. In other words, it is not enough for a State to claim that the prevailing situation justified action in self-defence. It must provide evidence of the existence of such circumstances.⁴⁰ This view was held by the International Military Tribunal of Nuremberg. The German Nazi leaders argued before the Tribunal that the violations of which they stood accused were actions taken in self-defence and that this was a matter for every State to judge for itself according to circumstances. The Tribunal dismissed that argument, insisting that “whether action taken under the claim of self-defence was in fact the aggressive or defensive must ultimately be subject to investigation or adjudication if international law is ever to be enforced.”⁴¹

Accordingly, if the Iraqi claims of Iranian shelling of its border towns prior to its action were true, then, *prima facie*, Iraq was acting in self-defence and its action was legally justified under Article 51 of the UN Charter, regardless the delay in response. In this respect, Iraq would have merely to prove the occurrence of Iranian attacks before it opened fire in self-defence. The facts, however, that the Iraqi claims of Iran’s prior shelling of Iraqi towns were ‘false’⁴² and the Iranian attacks were in response to the Iraqi invasion on September 22. This can be deduced from the Iraqi communications to the Security Council, which certainly up to 24 October 1980 (32 days after the beginning of the hostilities) did not claim any such action. The Iraqi justification at the time hinged on the breaches by Iran of the Algiers Agreement and the alleged sabotage

⁴⁰ Kaikobad, note 5 *supra*, p 58

⁴¹ Judgement of the International Military Tribunal at Nuremberg, 1946, 1 Trial of the German Major War Criminals Before the International Military Tribunal), printed in 41 *AJIL*, 1947, p 207 [Hereinafter Nuremberg Judgment]

⁴² Weisburd, note 1 *supra*, p 48

campaign.⁴³ It was not until a letter dated 24 October 1980 from the Iraqi Minister of Foreign Affairs to the Secretary-General that substantial military actions by Iran were alleged.⁴⁴ Nor does any other available survey of events makes reference to any Iranian military activities against Iraq, of a scale which would justify self-defence by such a large-scale action as was taken on 22 September 1980.⁴⁵ Furthermore, Iraq's argument that Iran was first to attack its towns on 4 September 1980 implies that Iraq waited more than 2 weeks to respond to these attacks. This delay in response is illogical in light of the fact that Iraq had nearly 1 million strong army⁴⁶ already deployed along its borders with Iran.

A.2.3 Claims of anticipatory self-defence

Iraqi officials used the classic criteria of the Caroline incident as a legal ground to justify the invasion. During the debate in the Security Council, the Iraqi Representative stated that the attack was in the nature of "direct preventive strike against military targets in Iran [which gave rise to] a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation."⁴⁷ Indeed, for Iraq, it seems that anticipatory self-defence was the only legal doctrine seriously available to justify the attack on such a large-scale.

Given the extent of Iraqi activities, one might assume that the amassing of Iranian troops on the frontier or any imminent attack would have been noted.⁴⁸ However, Iraq did not mention such a threat in its communications to the United Nations or other reports.⁴⁹ Furthermore, Iraq's claim of preventive self-defence contradicts its previous claim that the hostilities had been opened by Iran on 4 September 1980. If this had been the case, then it is strange that 22 September should

⁴³ Dekker, note 26 *supra*, p 255-6

⁴⁴ UN Doc. S/14236; see note 6 *supra*

⁴⁵ Amin, note 1 *supra*, p 167-8; see also Wright, note 1 *supra*, p 286-7

⁴⁶ Weller, note 4 *supra*, p 72; see also Wright, *ibid.*

⁴⁷ SCOR, 2250th meeting, 35th year, 1980, para. 40

⁴⁸ Dekker, note 26 *supra*, p 257

⁴⁹ By way of analogy, a few days before the Israeli preventive strike against Egypt in 1967 Israel reported to the Security Council that Egypt had begun a "massive troop concentration" in the Sinai Peninsula against Israel's southern border. See Chapter 7, section C.2.3

be described as the day “...on which Iraq exercised preventive self-defence to defend its people and territories.”⁵⁰

A.3 Territorial ambitions and a war of aggression

From the above examination of the legal grounds forward by the Iraqi authorities for the invasion, the inevitable conclusion is that Iraq’s use of force on such large-scale cannot be justified within the Charter’s framework of the use of force. Despite repeated assurances in its communications to the Secretary-General and the Security Council that its military actions were not territorially motivated,⁵¹ Iraq actually was clear about its territorial objectives and frank in stating its war aims. President Saddam Hussein in his address stated that “The Shatt shall again be, as it has been throughout history, Iraqi and Arab in name and reality, with all rights of full sovereignty over it.”⁵² Also, in a letter to the UN dated 21 September 1980, the Minister of Foreign Affairs of Iraq indicated that the border between his country and Iran, particularly in the Shatt-al-Arab, had been redrawn to correspond with the lines existing before the Algiers Accord.⁵³ These statements demonstrate clearly that Iraq’s military invasion of Iran was territorially motivated. As Dekker rightly concluded, “even the official Iraqi viewpoints reveal little more than a common war of aggression, in which expansionist ambitions at least play a role.”⁵⁴

As all Iraq’s legal justifications fail, therefore, Iraq’s unjustified military attack against Iran on 22 of September, 1980 falls within the scope of Article 3 (a) of the Definition of Aggression as

⁵⁰ *UN Doc. S/14236*

⁵¹ In a letter dated 21 September, 1980, from the Iraqi Minister of Foreign Affairs to the Secretary-General, he states that Iraq “...has no territorial ambition in Iran”, *UN Doc. S/14191*; in a further letter dated 24 September, 1980, he stated that “...my Government has on more than one occasion made it clear that we harbour no expansionist territorial designs against Iran. This policy was clearly stated in the statements emanating from the highest authorities of my Government”, *UN Doc. S/14192*

⁵² Saddam Hussein’s Address, note 8 *supra*

⁵³ *UN Doc. S/14191*. He further added that Shatt-Al-Arab “shall again be, as it has always been throughout history, an Iraqi river subject to the full control and sovereignty of Iraq.”

⁵⁴ Dekker, note 26 *supra*, p 259

an act of aggression.⁵⁵ In fact, Iraq's invasion of Iran, for its seriousness and brutality, may also be described as a "war of aggression" and, hence, constitutes a crime against peace.⁵⁶ Indeed, Article 6 (a) the Charter of the Nuremberg and Tokyo Military Tribunals defined crimes against peace as follows: "Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."⁵⁷ Although the Nuremberg Tribunal did not formulate a general definition of a "war of aggression", from their detailed discussions on German and Japanese foreign policies leading to the Second World War, the obvious conclusion is that the use of extensive armed forces by one State against another constitutes a "war of aggression", unless it is a response to a similar action by that State, or legally justifiable on other grounds, and when it has the intention of occupying or controlling the territory of that State.⁵⁸

Viewed in these terms, it appears reasonable to categorize the Iraqi invasion of Iran as a "war of aggression." This interpretation would still be valid even if it were possible only to demonstrate that the Iraqi intention was intended to achieve its aspiration for sovereignty over the entire Shatt-al-Arab.⁵⁹ In fact, this view was held by most of the world community. Particularly informative in this connection is Secretary-General Javier Perez de Cuellar's determination,

⁵⁵ According to Article 3 (a) of the Definition of Aggression "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof" is an act of aggression. United Nations General Assembly Resolution 3314 (XXIX) of 14 December, 1974

⁵⁶ Dekker, note 26 *supra*, p 264-6. A "war of Aggression" is more serious form of aggression and, therefore, it constitutes a crime against peace. Ibid, p 265. This principle was enunciated in the Declaration of Friendly Relations which states that "A war of aggression constitutes a crime against peace, for which there is responsibility under international law."

⁵⁷ *Nuremberg Judgment*, note 41 *supra*, p 174. Notably, the General Assembly, in Resolution 95(I) of 1946, affirmed the "the Principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal." General Assembly Resolution 95(I) of 11 December 1964 Similarly, the International Law Commission defined Crimes against peace as follows: " (i) Planning, Preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)." *ILC Yearbook*, 1950, 374-8

⁵⁸ Brownlie, I. *International Law and the Use of Force by States*, Oxford University Press, Oxford, 1963, p 209

⁵⁹ Dekker, note 26 *supra*, p 265

pursuant to Security Council Resolution 598,⁶⁰ that Iraq's attack on September 22 was a completely unjustified aggression in "violation of the prohibition against the use of force" and that Iraq was responsible for the conflict.⁶¹ Remarkably, the US Representative stated unequivocally in the Security Council that "the national integrity of Iran was threatened by the Iraqi invasion."⁶² This opinion was extraordinary at a time when Americans were still being held hostage in Tehran.⁶³

Section B: The Security Council and third States' responses to the Iran-Iraq

War

Iraq's aggression against Iran and its violations of the prohibition of the use of force in the UN Charter, the humanitarian law by using prohibited means of warfare and the law of treaty were unequivocal. This would have been sufficient grounds for the Security Council to invoke its powers under Chapter VII to impose non-forcible sanctions upon Iraq or even to take forcible action against it, if necessary, in order to stop the ongoing aggression and to restore international peace and security in the Gulf.⁶⁴ However, the reaction of the Security Council was unsatisfactory. Iraq's aggression was never condemned by the Security Council, and the Council's response to the war was minimal and negligent. Apart from the UN organs, the third States' reaction—especially the major powers—to the so called the "Tanker War" was also ambiguous and biased. This section highlights the Security Council and third States' reactions to the Iran-Iraq war and whether Iran was under obligation to discontinue its measures of self-defence when Iraq was driven back to the international boundaries in 1982.

⁶⁰ In Resolution 598 of 20 July 1987, the Security Council asked the UN Secretary-General to investigate responsibility for the conflict.

⁶¹ *UN Doc. S/23273*; see also *UNYB*, 1991, p 165

⁶² *UN Doc. S/PV.2252*, 1987, p 16

⁶³ A similar view was expressed by the French Representative, see note 89 *infra*

⁶⁴ Dekker, note 26 *supra*, p 268

B.1 The Security Council's response

The Security Council response to the Iran-Iraq War was relatively minimal for such a long war, which lasted eight years: 17 resolutions in that time. Despite the gravity of the situation, the Council took a mediatory—not mandatory—approach for most of the war. This approach was clear in the language of the resolutions. Initially, the Council responded to the situation by unanimously adopting Resolution 479 of September 28, 1980, which called upon both States to “refrain immediately from any further uses of force and to settle their dispute by peaceful means and in conformity with principles of justice and international law.”⁶⁵ Surprisingly, at the time the resolution was adopted, Iraqi forces were seizing Iranian territory; however, the Resolution did not call for a withdrawal to international boundaries but called on Iran as well as Iraq to refrain from the use of force. Resolution 479 (1980), thus, was inconsistent with the Council’s practice in the majority of similar cases. As a corollary, Iran rejected the resolution, stating that the Council “should condemn the premeditated act of aggression that has taken place, call for immediate withdrawal of the Iraqi forces from Iranian territory and call upon Iraq to compensate Iran for damages. It should also condemn the Iraqi authorities for war crimes.”⁶⁶

Ironically, on July 12, 1982—after Iraq was driven out of Iran and the day before Iran invaded Iraq—the Council unanimously adopted Resolution 514 calling for a withdrawal to international boundaries in addition to its call for a cease-fire.⁶⁷ The Resolution also asked other States to abstain from action that might contribute to continuation of the conflict.⁶⁸ Resolution 522 of October 4, 1982 essentially repeated Resolution 514, though welcoming Iraq’s acceptance of 514 and called upon Iran to do likewise, calling for a ceasefire, restraint from any action that might endanger peace and security, cessation of military operations against civilian targets and

⁶⁵ Security Council Resolution 479 of 28 September 1980

⁶⁶ Statement of the Representative of Iran to the UN, SCOR, 2252nd meeting, 35th year, para 87

⁶⁷ Security Council Resolution 514 of 12 July 1982

⁶⁸ Ibid

observation of humanitarian law, and affirming the right of freedom of navigation.⁶⁹ It is noteworthy that Resolutions 514 and 522 as well as Resolution 540 of 1983 were not also Council decisions pursuant to Articles 25 and 48 of the Charter.

Resolution 552 (1984) took a more forceful tone. It was adopted after shipping in the Persian Gulf came under attack by the belligerents, and it reaffirmed the right of free navigation in the Gulf, condemned attacks on ships sailing to and from Kuwait and Saudi Arabia, and demanded an end to such attacks. It described Kuwait and Saudi Arabia as “not parties to the hostilities.”⁷⁰ Surprisingly the Resolution did not explicitly refer to Iraqi attacks on third-State tankers carrying Iranian oil.⁷¹ Resolutions 582 of February 24, 1986, and 588 of October 8, 1986, and the discussions surrounding them were similar in tone, though Resolution 582 also “deplore[d]” both “the initial acts that gave rise to the conflict”⁷² and, among other disfavoured acts, “attacks on neutral shipping.” None of these Resolutions addressed the self-defence issue or attributed blame. Similarly, the General Assembly also adopted a resolution on 22 October 1982 calling for a cease-fire, without seeking to place blame. It was only in Resolution 598 of July 20, 1987 that the Security Council abandoned its conciliatory stance.⁷³ In that resolution, the Council determined the existence of a breach of a peace; invoked Chapter VII of the UN Charter, and demanded a cease-fire and withdrawal to international boundaries.⁷⁴ This resolution, unlike the previous ones, was mandatory.⁷⁵

The ambivalent attitude of the Security Council towards the conflict was obviously politically motivated, since there did not seem to be any legal reason why the Council should not condemn

⁶⁹ Security Council Resolution 522 of 4 October, 1982

⁷⁰ Security Council Resolution 552 of 1 June 1984

⁷¹ Weisburd, note 1 *supra*, p 49

⁷² Security Council Resolution 582 of 24 February 1986

⁷³ Weisburd, note 1 *supra*, p 49

⁷⁴ Security Council Resolution 598 of 20 July 1987

⁷⁵ Weller, note 4 *supra*, p 85

the Iraqi attack as an act of aggression.⁷⁶ As mentioned above, the members of the Security Council seem to have been in no doubt as to the facts of the matter. However, it seems that the Council's stance was influenced by Iran's disruptive activities in the region and Iran's neglect of international obligations, illustrated by the capture and holding hostage of American diplomats.⁷⁷ However, this conciliatory stance of the Security Council constituted a gross failure on the part of the Council to fulfil its primary responsibility, "to maintain international peace and security". It can be suggested that the stance taken by the Council contributed directly to the continuation of the hostilities for eight years.

B.2 The "Tanker War" and third-States' reaction

At the beginning of the war, major powers (including the US and the Soviet Union) announced their neutrality and the cut of armed supplies to both belligerents.⁷⁸ However, it was reported that, during the course of the hostilities, third States actively supported one or the other—or sometimes both—of the parties.⁷⁹ With the beginning of the so-called Tanker War in 1984, the partiality of the third States became unambiguous. The Tanker War was a notable aspect of the Persian Gulf conflict, where both belligerents during the war, albeit mostly Iraq, attacked shipping and merchant vessels in the Persian Gulf.⁸⁰ It was considered as a major incident in the history of naval warfare and the cause of the greatest loss of merchant ships and mariners' lives

⁷⁶ Dekker, note 26 *supra*, p 261

⁷⁷ Weisburd, note 1 *supra*, p 49

⁷⁸ Gioia, A. and Ronzitti, N. "The Law of Neutrality: Third States' Commercial Rights and Duties", in Dekker and Harry, note 4 *supra*, p 228-31

⁷⁹ At the start of the war the Soviet Union declared its neutrality, and cut off arms supplies to both sides, though it assisted Iran in repairing its tanks and continued its arms supplies to Iraq, 27 *Keesing's Contemporary Achieves*, 1981, p 31012. The United States likewise proclaimed its neutrality, while permitting the delivery to Iran of arms previously ordered and the transfer to Iran by third states of American-supplied arms. 28 *Keesing's Contemporary Achieves*, 1982, p 31521. France also provided arms, aircrafts and warships to Iraq. 29 *Keesing's Contemporary Achieves*, 1983, p 32595

⁸⁰ Gray, C. "The British Position in Regard to the Gulf Conflict", 37 *ICLQ*, 1988, p 423; for full account of the "Tanker War" see Walker, G. *The Tanker War, 1980-88: Law and Policy*, International Law Studies, vol. 74, Naval War College, Newport, 2000

since the Second World War.⁸¹ Third State reactions to this situation and the attitude of seafaring States toward attacks on shipping were significant. After Kuwaiti oil tankers passing through the Persian Gulf suffered attacks from Iran, France, Italy, Belgium, the United Kingdom, the United States, and the Soviet Union all sent warships to the Gulf to protect vessels under their registration. In addition, the US, the UK and USSR allowed several Kuwaiti-owned tankers to be re-flagged as their own tankers.⁸² However, this protection was afforded only against Iranian attacks; no action was taken to prevent Iraqi attacks on tankers carrying Iranian oil. Furthermore, in a series of incidents, the US engaged Iranian minelayers and boats used for attacks on shipping; it also, on October 1987, attacked an Iranian platform used for military purposes. In July 1988, the USS Vincennes shot down an Iranian civilian Airbus Flight 655 claiming the right of anticipatory self-defence.⁸³

Thus, third State reactions were not based on determination of the illegality of the belligerents' actions; in fact, third States showed a reluctance to make such an assessment. The ambiguity of third States' reactions to the Iraqi invasion of Iran and their clear bias for the Iraqi side was driven by their political and national interests and the deteriorating reputation of the Islamic Republic of Iran in the international community, especially after the Tehran Diplomatic Hostages episode. Viewed from a legal perspective, however, the reactions to the conflict, in general, and to the Tanker War, in particular, raised crucial legal questions regarding the concept of "neutrality" in international law. Was the third States' reaction a reflection of their acceptance of the Iraqi justifications for the war, or can it be considered as the emergence of a new rule of international customary law authorizing the invasion of a State perceived as ruled by an unreasonable regime?

⁸¹ Walker, *ibid*, p 74

⁸² *Ibid*, p 60; Gray, note 80 *supra*, p 423-4; see generally Gamlen, E. and Rogers, P. "U.S Re-flagging of Kuwaiti Tankers", in Rajaei, F. [ed.], note 30 *supra*

⁸³ Gray, *ibid*, p 426-7; see also Chapter 7, section C.2.5 for the incident of Iranian Airbus Flight 655

Generally speaking, the principle of neutrality seems problematic under the Charter legal system. On the one hand, the principle of neutrality supposes that third States should be impartial and refrain from supporting one or another party of the conflict. On the other hand, under the Charter, States are required to refrain from violating Article 2 (4); assertions of neutrality, placing violators and their victims on an equal footing may amount to acceptance of such a violation.⁸⁴ Therefore, a strong argument can be made that the concept of neutrality is inconsistent with the legal system that the UN Charter purports to establish. In the present case, the Security Council, as it appears from several resolutions, took the view that States not involved in the fighting could be regarded as neutral. The Council, for example, called upon Iran to stop its attacks against Saudi and Kuwaiti ships in the Gulf and characterized those States as neutral,⁸⁵ even though they provided vital subsidies to Iraq.⁸⁶ In this context, it has been argued that the Security Council's failure to identify an aggressor in this case left the way open for members of the United Nations to take such a position.⁸⁷

Regardless the problematic question of neutrality and its application under the Charter system, third States' reactions towards the conflict and the clear bias to the Iraqi side were clearly inconsistent with the principle of neutrality in international law.⁸⁸ However, at any rate, the muted response to Iraq's invasion of Iran and the bias towards the Iraqi side should not be regarded as evidence of acceptance of some principle invoked by Iraq, nor should it be taken as implying support for a view that such invasions are not contrary to customary international law. It is more likely that the bias towards Iraq and failure to condemn the Iraqi invasion was due to

⁸⁴ Weisburd, note 1 *supra*, p 51

⁸⁵ In Resolution 552 of 1 June, 1984, the Security Council characterized Saudi Arabia and Kuwait as "not parties to the hostilities."

⁸⁶ Iran disputed this stance and tried to justify its attacks against ships en route to and from the ports of Saudi Arabia and Kuwait on the basis that those countries were not in fact neutral but partial to Iraq, since they extensively subsidized Iraq's war efforts. Therefore, they cannot avail themselves of the law of neutrality. *UN Docs. S/16585* (25 May 1984) and *S/18557* (5 January 1987)

⁸⁷ Gioia and Ronzitti, note 78 *supra*, p 240

⁸⁸ Bothe, M. "Neutrality at Sea", in Dekker and Harry, note 4 *supra*, p 206-7

fear and suspicion of Iran. There was a prevailing concern at the time that Iran intended to provoke an Islamic revolution throughout the Gulf region. Although Iran showed no sign of immediate intent to launch a conventional attack on any of its neighbours, it was evidently trying to undermine the governments in several of them, including Iraq, causing third States to fear that stability in the Gulf would be jeopardised.

Indeed, in reality, the policy of a State and its unfriendly attitude in the international community is not time-bounded, but can cause remote effects. It might weaken the reaction of the international community when it came under attack or invasion, in the sense that it leads to greater toleration of the action taken by the attacker State. For example, during the first debates in the Security Council regarding the Iran-Iraq conflict, the French Representative implicitly placed the blame upon Iraq by declaring that in order to ensure its security, “one of the protagonists has placed its hopes in weapons”, then he asked, “But, as for the other, has it always refrained from using weapons against its neighbour?”⁸⁹ This view may be explained in light of the international reaction to the Kuwait crisis. In contrast to the hesitant and muted reaction to the Iran case, the world reaction to the Iraqi invasion of Kuwait, which had no violent history towards its neighbours, was completely different. The world community and the Security Council acted vigorously from day one to bring the Iraqi occupation of Kuwait to an end. It is not suggested that this argument has yet been developed as legal rule, but it seems that it is a political reality. Like any community, the community of States can be influenced by the behaviour and attitude of a State. A regime that violates international law and displays a distorted attitude towards the international world order should not expect a vigorous reaction from the world community when its rights are violated. In a sense, the history of a State could work as “criminal records” do in municipal criminal laws. Recently, after the events of September 11,

⁸⁹ *UN Doc. S/PV.2252*, 1987, p 6

this trend has become more obvious. For example, the world community almost unanimously supported the US action to overthrow the Taliban Regime in Afghanistan, which had for a long time been perceived as an irrational and isolated regime.

Conclusion

The legal justifications forwarded by Iraq for its invasion of Iran do not stand much scrutiny. In light of factual circumstances, none of the legal grounds invoked by Iraq can justify the use of force on such a large scale under the rules of the use of force in the UN Charter. Therefore, the inevitable conclusion is that Iraq's invasion of Iran in 1980 was a war of aggression motivated by territorial ambitions. However, Iraq's aggression was never condemned by the Security Council. The ambiguity of third States' reactions and the weak response of the Security Council reflected political considerations and the suspicion towards the Islamic Republic of Iran in the international community, especially after the Tehran hostage events. Iran's violation of international law and its attitude in the international community contributed towards more toleration of the Iraqi aggression. Indeed, the lack of reaction to the Iraqi invasion of Iran reflects this history, rather than acceptance of any of Iraq's argument, or of a general view that such invasions are not contrary to customary international law.

Despite this muted reaction for Iraq's aggression, the Iran-Iraq War permanently altered the course of Iraqi history. It strained Iraqi political and social life, and led to severe deterioration of the reputation of the regime headed by Saddam Hussein. Ever since, Iraq was widely perceived as a rogue State headed by a vicious, irrational dictator who posed a threat to the international peace and security in Middle East. In particular, Iraq's frequent use of chemical weapons against Iranian military personnel and civilians raised concerns among the world community regarding the military capabilities of Iraq and the dangerous consequences of allowing such a regime to possess WMDs, especially as it was known at the time that Saddam Hussein was pursuing

nuclear weapons.⁹⁰ Thus, this war set in motion effects and developments which had long-term implications that ultimately led to the U.S.—led coalition against Iraq in March 2003 and the demise of the Iraqi regime.

From another perspective, the Iran-Iraq war, among other elements, enhanced the prospects of the invasion of Kuwait and contributed to Iraq's decision to invade Kuwait in two basic ways. First, the support of Iraq during the Iran-Iraq war, especially from the United States, increased Iraq's confidence and thus made it more inclined to invade Kuwait than it otherwise would have been. Second, the muted and poor approach of the Security Council and the absence of any condemnation or even placing blame upon the Iraqi aggression made Iraq more confident that it would not face condemnation or a severe reaction if it invaded Kuwait.

⁹⁰ See Chapter 7, section C.2.4 for the Israeli attack on the Iraqi nuclear reactor

Chapter 3

The Invasion of Kuwait and Operation Desert Storm 1990-1991

Introduction

Iraq's invasion and purported annexation of Kuwait in August 1990 was the trigger for the confrontation between Iraq and world community that led to the invasion of Iraq in 2003. The enormity of Iraq's invasion of Kuwait and its repercussions, including the authorization of force against Iraq issued by the Security Council in Resolution 678, the disarmament sanctions imposed upon Iraq after the cease-fire in Resolution 687, and Iraq's defiance of these sanctions were the foundations for the decision to invade Iraq and remove Saddam Hussein and his regime from power. The present chapter seeks to provide a comprehensive analytical view of the Kuwait crisis and its sequels. It is concerned with Iraq's invasion of Kuwait and the events following this crisis, up to *Operation Desert Storm*. The sequelae after the formal cease-fire established in Resolution 687 will be examined separately in the ensuing chapters.

The first section of this chapter focuses on Iraq's invasion and the measures taken by the Security Council in response to it, including the economic sanctions imposed in Resolution 661 and the naval blockade authorized by the Council in Resolution 665. It also examines the authorization of the use of force against Iraq issued in Resolution 678 and whether resort to force was essential to secure Iraq's withdrawal from Kuwait or non-forcible measures would have been enough to achieve that goal, had they been given more time. The second section examines one of the most controversial issues raised in the context of the Gulf war, that is, whether the action undertaken by the coalition forces was an exercise of the right of collective self-defence with the legitimate government of Kuwait under Article 51 of the UN Charter, or was carried out under the authority of Chapter VII as the first Security Council enforcement action. The third

section explores the “authorization technique” invented by the Council in this crisis, which became the model to follow in subsequent situations where the Council deemed appropriate the use of military force. It examines the legality of this method of collective security, its legal basis in Chapter VII and, particularly significant, the lack of Security Council control over the course of hostilities under this newly invented technique. The final section investigates the limits and objectives of the Gulf campaign in light of the condition of proportionality of the use of force in the international law of warfare. It attempts to evaluate whether the coalition forces in 1991 were legally justified in continuing their military operation to the source of aggression and overthrowing the aggressive regime. The conclusions reached in this chapter will be depended upon in the assessment of the legality of the invasion of Iraq (2003) presented in subsequent chapters.

**Section A: Kuwait crisis and the Security Council's efforts to secure Iraq's
withdrawal**

On August 2, 1990, news broke of Iraq's massive invasion and purported annexation of the "State of Kuwait."¹ The Iraqi Revolutionary Command Council proclaimed that it had "decided to return the part and branch, Kuwait, to the whole and origin, Iraq, in a comprehensive, eternal and inseparable merger unity..."² Thus, similar to its unlawful repudiation of the 1975 Algiers Treaty with Iran,³ by this proclamation, Iraq renounced its former recognition of "the independence and complete sovereignty of the State of Kuwait" evinced in the 1963 Agreed Minutes between the two States.⁴ Iraq's claim to Kuwait as "lost" Iraqi territory, however, was rejected by almost all States of the world community who condemned Iraq's aggression against Kuwait and demanded immediate withdrawal from Kuwaiti soil.⁵

This was not the first attempt by a State forcibly to pursue control of territory it claimed as its own, but never before, since the founding of the United Nations, had the entire territory of a member State been forcibly annexed.⁶ The invasion of Kuwait was best described by Greenwood: "Iraq struck at the cornerstone of the post-1945 international legal order, the

¹ During the 18th Century, "Qurain", as Kuwait was then called, was occupied by Arab tribes. In the Anglo-Ottoman Convention of 1913, Kuwait was defined as an "autonomous caza" of the Ottoman Empire and the Sheikhs of Kuwait classed not as independent leaders, but as provincial sub-governors of the Ottoman government. After World War I, the British Empire invalidated the Anglo-Ottoman Convention, declaring Kuwait to be an independent sheikhdom under British protection. On June 19, 1961, Kuwait declared independence. This move was challenged by Iraq which claimed that Kuwait was an integral part of Iraqi territory. However, a threatened Iraqi invasion was deterred by the dispatch of British troops. In 1963, however, Iraq formally recognized the State of Kuwait with its established boundaries.

² Arend, A. & Beck, R. *International Law and the Use of Force: beyond the UN Charter paradigm*, Routledge, London, 1993, p 187

³ See Chapter 2, section A.1

⁴ The first paragraph of the 1963 Agreed Minutes between the Republic of Iraq and the State of Kuwait states that "the Republic of Iraq recognized the independence and complete sovereignty of the State of Kuwait with its boundaries as specified in the letter of the Prime Minister of Iraq dated 21. 7. 1932 and which was accepted by the Ruler of Kuwait in his letter dated 10.8. 1932", available at <www.meij.or.jp/text/Gulf%20War/agreed.htm>

⁵ Cox, D. *The Use of Force by the Security Council for Enforcement and Deterrent Purposes: a Conference Report*, The Arms Control Centre, 1990, p.42

⁶ Schachter, O. "United Nations Law in the Gulf Conflict", 85 *AJIL*, 1991, p 452-3

prohibition on the use of force against the territorial integrity of another State.”⁷ Indeed, by invading Kuwait Iraq challenged the global stability of the post-Cold War era and this alone indicated that decisive actions should be taken against the threat. Iraq’s sudden invasion and attempted annexation of Kuwait and other related activity on Iraq’s part during the Gulf crisis were clearly in contravention of the rule of law. They violated at least nine major categories of legal obligations fundamental to international law, namely:

- Waging a war of aggression against Kuwait contrary to the prohibition of the use of force in international relations affirmed in Article 2(4) of the UN Charter;
- Carrying out aggressive Scud missile attacks against Saudi Arabia and Israel;
- Violation of the Pact of the League of Arab States;
- Violation of the 1963 Agreed Minutes;
- Violation of at least seven binding UN Security Council resolutions, adopted during the crisis calling upon Iraq to end its illegal occupation of Kuwait. These resolutions are Resolution 660 of 2 August 1990, Resolution 661 of 6 August 1990, Resolution 664 of 18 August 1990, Resolution 666 of 13 September 1990, Resolution 667 of 16 September 1990, Resolution 674 of 29 October 1990, Resolution 677 of 28 November 1990;
- Widespread violation of the laws of war, notably Iraq’s obligations under the 1949 “Fourth” Geneva Convention Relative to the Protection of Civilian Persons in Time of War, under the 1949 “Third” Geneva Convention Relative to the Treatment of Prisoners of War;
- The taking of hostages and support for terrorism;
- Violation of general international human rights standards;
- Violation of international diplomatic and consular protection.

⁷ Greenwood, C. “New World Order or Old? The invasion of Kuwait and the Rule of Law”, 55 *The Modern Law Review*, 1992, p.153

A.1 Non-forcible sanctions and the affirmation of the right of self-defence

Contrary to the poor showing of the Security Council during the Iran-Iraq war, the Council responded to invasion of Kuwait with unprecedented speed. On the same day that Saddam Hussein's troops invaded and occupied Kuwait, the United Nations Security Council answered with Resolution 660, demonstrating its determinant and active role. Resolution 660 was adopted unanimously by the Members of the Council.⁸ It defined the invasion as "a breach of international peace and security" and demanded the immediate and unconditional withdrawal of Iraqi forces from Kuwait. It also called on both countries to begin "intensive negotiations" to resolve their differences.⁹ The resolution explicitly invoked Articles 39 and 40 of the Charter. Thus, the matter was placed under Chapter VII, giving the Council power to impose mandatory measures. It seems that by the invocation of the power of Chapter VII, right from the outset, the Council was signaling that it is determined to take tough stance against Iraq's aggression and to bring about a quick and decisive way out of the crisis.

Only four days later, on August 6 (1990), the Council adopted Resolution 661 noting the Iraqi failure to comply with Resolution 660 and deciding to "bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait."¹⁰ To that end, the Council imposed trade and financial embargo on a defiant Iraq. Resolution 661 called on all States to cease imports from, and exports to, Iraq and Kuwait. It outlawed financial transfers to Iraq and Kuwait and, in effect, required a freeze on the bank accounts affected.¹¹ Importantly, however, in the Preamble of 661, the Council explicitly affirmed "the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter." This was the first

⁸ The resolution was adopted by 14 votes to none; Yemen abstained

⁹ Security Council Resolution 660 of 2 August, 1990

¹⁰ Security Council Resolution 661 of 6 August, 1990

¹¹ Ibid

resolution in which the Council expressly declared the applicability of the right of individual or collective self-defence in a particular situation. It is noteworthy, too, that this declaration was made in the same resolution in which the Council mandated economic sanctions.¹² The question raised by the affirmation of the right of self-defence was; what is the legal significance of such pronouncement? As shown in Chapter 1, the right of individual or collective self-defence granted in Article 51, is an inherent and autonomous right independently exercisable and not susceptible of the approval of the Security Council.¹³

Schachter argued that, from a legal standpoint, the Council's endorsement of the right of collective self-defence was not strictly necessary. It only helped to strengthen the case against Iraq and gave weight to the view that the use of force by third States would be permissible, to compel Iraq's withdrawal.¹⁴ He interpreted the reference to self-defence as a confirmation for the view that self-defence remains available for the victim State until the measures taken by the Council prove successful to remove the invader from the occupied territories.¹⁵ Thus, he took the view that the adoption of necessary measures by the Council does not automatically suspend the injured State's right of self-defence. It seems, however, that the affirmation of the right of self-defence in the Preamble of Resolution 661 is more appropriately to be taken as an indication for the exactly opposite view. By affirming the existence of the right of self-defence, the Council intended to allow that right to continue, despite the economic sanctions imposed by the resolution; in an exemption to the language of Article 51 which permits self-defence only "until the Council has taken measures necessary to maintain international peace and security." In other words, the Council aimed to exempt this case from the general rule that the right of self-defence should cease once the Council has taken the necessary measures to face the situation. This view

¹² Schachter, note 6 *supra*, p 457

¹³ See Chapter 1, section D.2

¹⁴ Schachter, note 6 *supra*, p 458

¹⁵ *Ibid*

is supported by the language used by the Council in Paragraph 9 of the operative part of the resolution: “notwithstanding paragraphs 4 through 8 above”—that is, the paragraphs decreeing sanctions—“nothing in the present resolution shall prohibit assistance to the legitimate Government of Kuwait.” If the right of individual or collective self-defence was any way available, as suggested by Schachter, there would be no need to repeat such affirmation after articulating the sanctions and to use the term “notwithstanding.”

Another legal significance of Paragraph 9 is that the Council accepted that third States may render assistance to the legitimate government of Kuwait, including military assistance, despite not themselves having been attacked, and not being bound by special agreements with Kuwait, contrary to the general understanding that collective self-defence under Article 51 is available only for States that had concluded mutual defence and collective security pacts and arrangements prior to the present conflict.¹⁶ Both pronouncements—on self-defence and the right of third State to render assistance to the legitimate government of Kuwait—were legally pivotal because they constituted exceptions from the general rules. (Both arguments will be discussed in more detail below)

A.2 The authorization of naval blockade

Less than three weeks after the adoption of Resolution 661, the Council was concerned to learn of continued use of Iraqi vessels to export oil. This prompted the Council to adopt Resolution 665 calling “upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces in the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and

¹⁶ See section C.2 below

to ensure strict implementation....”¹⁷ of Resolution 661.¹⁸ Resolution 665 was interpreted as authorizing States to deploy naval power to enforce the embargo.¹⁹

Prior to the adoption of Resolution 665, The United States had already started the first phase of the operations in the Gulf by stationing forces in Saudi Arabia and its naval contingents were used to blockade Iraq as a means of enforcing the embargo against Iraq adopted in Resolution 661.²⁰ On August 16, 1990, the U.S. Department of Defence announced that President Bush had authorized: “U.S. forces to participate in a multinational effort that will intercept ships carrying products and commodities that are bound to and from Iraq and Kuwait. This action is consistent with U.N Security Council Resolution 661, which imposed mandatory sanctions on trade with Iraq and occupied Kuwait.”²¹

Thus, from another perspective, Resolution 665 can be seen as an approval or after-the fact authorization of the position of the United States and the coalition and the actions they had already taken in the area. This approval can be inferred from the language of the resolution when it refers to “Member States co-operating with the government of Kuwait which are deploying maritime forces to the area.” This language also indicates that it was left to each of those States, possibly in consultation with Kuwait and others States whose forces were endangered, to make

¹⁷ Security Council Resolution 665 of 25 August 1990

¹⁸ In addition to its trade embargo against Iraq, the Security Council later adopted Resolution 670, under which States were required to refuse permission to any aircraft destined for Iraq or Kuwait to overfly their territory, except with the prior approval of the United Nations. The resolution also continued measures to strengthen compliance with the economic sanctions. Security Council Resolution 670 of 25 September, 1990

¹⁹ The only previous occasion when a similar use of force had been authorized by the Council in relation to trade sanctions was when it had specifically authorized the United Kingdom to block vessels believed to be transporting oil to Southern Rhodesia, contrary to a Security Council embargo by using force if necessary. See Chapter 1, section, C.1.1

²⁰ It was reported during this action that the US naval forces fired shots across the bows of two Iraqi tankers, but allowed the ships to continue their passage without further action. *UN Doc. S/PV. 1441*, p 41

²¹ U.S. Secretary of Defence, Washington, D.C., Public Affairs Guidance Message 1702052, 16 August, 1990. Quoted in Moore, J. *Crisis in the Gulf: Enforcing the Rule of Law*, Oceana Publications, London, 1992, p145

an assessment as to the adequacy of measures taken in response to the Iraqi aggression were sufficient, and if they were deemed insufficient, what further action would be needed.²²

A.3 Resolution 678 and necessity of the use of force

The question now arises whether the sanctions imposed upon Iraq in Resolutions 661 and 665 were sufficient to secure Iraq's withdrawal from Kuwait or the use of force was necessary to achieve this goal. Within the first two months, the general effectiveness of the sanctions was evident. The embargo had succeeded in preventing Iraq from exporting oil and had denied access to important technical and military supplies. It was evident that the Iraqi economy had suffered a severe blow. It was not certain, however, whether these measures, even if continued, would induce the Iraqi leadership to implement the required policy change, or how long such change might take to secure.²³ Most likely, though, these sanctions would not have succeeded in securing Iraq's withdrawal from Kuwait. In reality, the effect of economic sanctions is felt predominantly on the ordinary people within the sanctioned territory (who often have little or no voice in political decisions) rather than the government and powerful elites.²⁴

By November 1990, the United States had come to the view that economic sanctions were not adequate to compel Iraq to withdraw from Kuwait and the use of military force is necessary. It solicited the support of other Council members, and even persuaded some of them, for a resolution authorizing the States assisting Kuwait to take the necessary means to enforce the previously-adopted resolutions and to restore peace and security in the Gulf region.²⁵ As a result, Resolution 678 was adopted, reportedly, because in the view of the majority of the Security

²² Chayes, A. "The Use of Force in the Persian Gulf" in Damrosch L. and Scheffer, D. [ed.], *Law and Force in the New International Order*, Westview Press, Oxford, 1991, p 3

²³ Schachter, note 6 *supra*, p 455

²⁴ Kirgis, F. "The Security Council's First Fifty Years", 89 *AJIL*, 1995, p 536; see also Chapter 8, section D.1

²⁵ Weston, B. "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy", 85 *AJIL*, 1991, p.523. It was reported that to ensure the votes of the Latin American and African delegations (Colombia, the Cote d'Ivoire, Ethiopia, Zaire) in the Security Council, the United States is said to have promised long-sought financial help and attention. *Ibid*

Council, the embargo was or would be insufficient to secure Iraq's withdrawal from Kuwait.²⁶ Two members of the Council (Cuba and Yemen,) however, voted against the resolution. Yemen expressed doubts as to its validity, arguing that the Council, in authorizing the use of force, had failed first to determine that economic sanctions would be inadequate. It considered that such a determination was necessary for the authorization of force under the terms of Article 42.²⁷ This argument seems to be groundless for two reasons. First, as indicated in chapter 1, Chapter VII of the UN Charter gives the Security Council considerable discretion in the exercise of its authority. The Council thus has the power to decide that non-military measures will not suffice, and to take the decision to use armed force immediately and at the outset, if necessary, without first resorting to non-forcible measures.²⁸ Second, Article 42 imposes no obligation on the Council to explicitly pronounce in the text of the resolution that the non-forcible measures have proved to be inadequate. This can be inferred also from the language of Article 42 which states that "should the Security Council consider...." not "decide."

Another issue raised at the time was related to the condition of necessity of use of force; whether the use of force was "necessary" to drive Iraq out of the Kuwaiti territory. In other words, would economic sanctions be effective enough to make military action unnecessary? Those countries who opposed the use of force argued that, given sufficient time, sanctions would achieve their goal. They contended, therefore, that force was not needed as a matter of self-defence and that the cost in human lives and materials could not be justified.²⁹

²⁶ See statements by Representatives of the Council Members in *UN Doc. S/PV. 2963*, 29 November 1990. The Representative of Malaysia, Mr. Abu Hassan, for example, stated that "Iraq had shown no indication of complying with the Council's resolutions," p 74. Similarly, the Representative of China, although abstained from the voting, stated that "Iraq had thus far not taken any practical steps on the key question of withdrawing troops from Kuwait," p 61

²⁷ See statement by the Representative of Yemen, Ambassador Al-Ashtal, *ibid*, p 32-38

²⁸ See Chapter 1, section C.1

²⁹ Ambassador Al-Ashtal of Yemen stated that "comprehensive and almost totally airtight sanctions regime would eventually force Iraq to comply and withdraw from Kuwait. It was too early to say that sanctions were

This argument, however, constitutes a departure from the general view that a large scale illegal armed attack, *per se*, suffices to meet the requirement of necessity of the use of force, whether in self-defence or in enforcement action. In case of self-defence, Article 51 permitted States to use force in self-defence “if an armed attack occurs”; it did not, however, require a State victim to an armed attack to exhaust peaceful means before opening fire. Indeed, such a requirement would effectively undermine the right of self-defence.³⁰ As to enforcement action, as indicated above, under Chapter VII, the possibility that the aggression might be ended by economic and other non-forcible measures was not viewed as undermining the Council power to take an enforcement action directly.³¹ Admittedly, there might be occasions when peaceful measures adopted instead of armed force would be adequate to redress the wrong of an armed attack. However, to conclude on this basis that forcible measures against an attack or invasion cannot be justified under the “necessity” criterion until non-forcible measures have been tried and proved ineffective would be a significant departure from the prevailing view. As a practical matter, there is clearly a danger that peaceful measures could be blocked by delaying tactics or unreasonable demands on the part of the aggressor; meanwhile he is left free to pursue his goals at the victim’s expense.³² Above all, the authorization of the use of force in Resolution 678 essentially implies that the Security Council, a competent international body, has determined that the use of force was necessary to repel the aggression.

not working; patience was needed. *Doc. S/PV. 2963*, note 26 *supra*, p 32-38. Cuba similarly favoured a peaceful resolution for the crisis, p 52-60

³⁰ Schachter, O. “The Right of States to Use Armed Force”, 82 *Michigan Law Review*, 1984, p 1635

³¹ Note 28 *supra*

³² Schachter, “The Right of States to Use Armed Force”, note 30 *supra*, p 1636

Section B: The Gulf campaign: enforcement action or collective self-defence?

In the legal literature, the most controversial issue raised by the language of Resolution 678 and the factual circumstances surrounded the Gulf campaign was whether the Gulf War of 1990-1991 should be classed as an “international enforcement action” of the United Nations Security Council or as an exercise of collective self-defence carried out with the sanction of the Security Council.³³ Before embarking on the legal debate on this question, the following part will briefly review the measures of collective self-defence that were already underway by the Allies.

B.1 Measures taken in collective self-defence under Article 51

Parallel with the actions taken by the Council in its attempt to bring an end to the crisis, on the ground, there were measures of collective self-defence already underway. Very soon after Iraq’s invasion of Kuwait, the issue of collective self-defence was raised when the United States, the United Kingdom and Saudi Arabia took measures to respond to Kuwait’s request for assistance. A few days later, reports of massive concentration of Iraqi forces on Kuwait’s southern border prompted the Saudi government to invite the US to station troops on Saudi territory, as a deterrent against possible Iraqi aggression. The US sent both ground and air forces, with the declared purpose “to deter further Iraqi aggression.”³⁴ The mission of the troops was described as “wholly defensive.”³⁵ It was clearly stated that these troops would not initiate hostilities, but would defend themselves, the Kingdom of Saudi Arabia and other allies in the region.³⁶ Over the next few weeks, further deployments brought the number of troops to about 140,000. Troops were sent by other countries, including some of the Arab States, to join the U.S. forces.

³³ See Generally Schachter, “United Nations Law in the Gulf Conflict”, note 6 *supra*; Chayes, note 22 *supra*; Weston, note 25 *supra*; Mullerson, R. “Self-Defence in the Contemporary World” in Damrosch and Scheffer [ed.], note 22 *supra*; Rostow, E. “Until What? Enforcement Action or Collective Self-Defence”, 85 *AJIL*, 1991; Franck, T and Patel, F. “UN Police Action in Lieu of War: The Old Order Changeth” 85 *AJIL*, 1991

³⁴ *Excerpts From Bush’s Statement on U.S. Defense of Saudis*, N.Y. Times, 9 August, 1990, at A15, col. 1. Quoted in Chayes, *ibid*, p 2

³⁵ *Ibid*

³⁶ *Ibid*

Reinforcements were sent to U.S naval forces already operating in the Persian Gulf. The U.S naval forces, like those on land, were significantly augmented by contingents from other countries.³⁷ As indicated above, these actions were approved by the Security Council in Resolution 665.³⁸

The right of collective self-defence, however, was raised again within a few weeks of the United Nations' imposition of sanctions under Article 41. Taking the view that these measures would be insufficient to secure an Iraqi withdrawal, the United States, the United Kingdom, and others proposed military action, which they considered as permissible collective self-defence, based on the necessity of ensuring the unconditional withdrawal of the aggressor.³⁹ The controversial issue then was whether the United States and the coalition were free, even in the absence of further provocation by Iraq against Saudi Arabia or authorization by the Security Council, to use force against Iraq by virtue of some continuing right of collective self-defence emanating from the original attack on Kuwait. In other words, so the argument runs, the original deployments in Saudi Arabia and the Persian Gulf region were made in response to the armed attack on Kuwait and thus could be seen as an exercise of the inherent right of collective self-defence.⁴⁰ In addition, the Council seemed to approve the position taken by the US and the coalition. On the other hand, eminent scholars have opposed this proposition. The debate is reflected below, beginning with the case against the self-defence proposition.

B.2 The academic debate

Some prominent international lawyers have characterized the action taken by the coalition against Iraq as a Security Council "enforcement action" under the authority assigned to the

³⁷ Ibid

³⁸ See section A.2 above

³⁹ Schachter, "United Nations Law in the Gulf Conflict", note 6 *supra*, p 458

⁴⁰ Chayes, note 22 *supra*, p 3

Council by Chapter VII of the Charter, not an exercise of the right of collective self-defence.⁴¹ This view is grounded on the language of Article 51, which asserts that nothing prevents the right of self-defence “until the Council has taken measures necessary to maintain international peace and security.” Accordingly, Kuwait’s right of individual or collective self-defence ceased after the Security Council imposed what it considered to be necessary measures against an act of aggression: the economic sanctions stipulated in Resolution 661.⁴² Professor Mullerson argues that from the time the Security Council first takes note of a conflict and begins to consider whether it amounts to a threat to the peace, a breach of the peace, or an act of aggression, the “inherent” right of self-defence becomes “dormant.” It only re-emerges if the Security Council voters decide that it has failed to resolve the conflict.⁴³ Thomas Franck and Faiza Patel, similarly, argued that “The Charter, in creating the new police power, intended to establish an exclusive alternative to the old war system. The old system was retained only as a fallback, available when the new system could not be made to work; notas an equal alternative, to be chosen at the sole discretion of the members.”⁴⁴ This means that any military action taken by States in self-defence under Article 51, will be incorporated into the global enforcement measures once such a response is activated. In other words, the validity of the old approach ceases when operations begin under the new one.⁴⁵ Article 51, from this perspective, is not an “affirmative grant of a right of self-defence”⁴⁶ but an indication of the circumstances in which the use of armed force in exercising of an “inherent right” is not ruled out by the Charter. However, the safeguard is finite,

⁴¹ Ibid; see also Mullerson, note 33 *supra*, p 22-3

⁴² Schachter, O. “The United Nations Law in the Gulf Conflict”, note 6 *supra*, p.458

⁴³ Mullerson’s speech at the Conference on International Law and the Non-Use of Force, convened jointly by the American Society of International Law and the Soviet Association of International Law, Washington, D.C. 4-6 October, 1990. Cited in Rostow, note 33 *supra*, p.511

⁴⁴ Franck and Patel, note 33 *supra*, p 64

⁴⁵ Ibid, p 63; see also Chapter 1, section E.1

⁴⁶ Chayes, note 22 *supra*, p 3

applying only “until the Security Council has taken the measures necessary to maintain international peace and security.”⁴⁷

Indeed, this interpretation is consistent with plain language of Article 51 as well as the intention of the drafters of the Charter. As will be shown in the following chapter, a legal document should be primarily interpreted as it stands, and according to the natural and ordinary meaning of the text.⁴⁸ Interpreting the text of Article 51 in accordance with this principle leaves no doubt that the drafters of Article 51 intended to represent the right of self-defence as an interim right “until the Council has taken measures necessary to maintain international peace and security.” The word “until” clearly indicates that temporary character.⁴⁹ In view of that interpretation, the right of self-defence would be overridden once the Council assumed its jurisdiction under Chapter VII and adopted measures considered necessary to deal with the situation. This interpretation is also consistent with the basic intention of Article 2(4), which is to limit as far as possible the permissible occasions for the unilateral use of force, confining it to those situations when there is an urgent and obvious need for an armed response.

As against this position, others have argued that the Gulf War was an exercise of the right of collective self-defence under Article 51 of the UN Charter and strenuously rejected the view that the assumption of jurisdiction by the Council automatically deemed to suspend the injured party’s rights of self-defence.⁵⁰ They argue that such a proposition, if accepted, would lead to the conclusion that the exercise of the “inherent” right of self-defence is subject to the permission of the Council.⁵¹ In their view, Article 51 makes clear that the right of self-defence, an ancient right enshrined in customary law, is in no weakened by the Charter but continues to apply until the

⁴⁷ Ibid

⁴⁸ See Chapter 4, section B.2.2

⁴⁹ See Chapter 1, section E.1

⁵⁰ See Rostow, note 33 *supra*, p.513; Schachter, “The United Nations Law in the Gulf Conflict”, note 6 *supra*, p 458

⁵¹ Rostow, *ibid*, p 506

Council has successfully dealt with the issue facing it.⁵² In occupation situations, measures cannot be considered successful as long as the aggressor still occupies the territories on the victim State—which was the case in the Gulf, notwithstanding Resolution 660 and subsequent Security Council resolutions.⁵³ In other words, the focal point of this view is the results achieved, not the action itself. Nevertheless, this view admits that the Security Council has the last word, and can stop a war of self-defence by deciding it has become a breach of the peace.⁵⁴ Otherwise, the Council's inscription or enclosure of the matter in its agenda, or even a call for cessation of hostilities, is not enough to restore international peace and security.

Professor Dinstein also rejected the view that the adoption of measures by the Security Council would automatically be sufficient to remove the right of self-defence, on the grounds that in some situations the Council may take on inadequate or half-hearted enforcement measures, economic sanctions, for example, and desist from giving further instructions to the parties of the conflict. In Dinstein's words, "What is the legal status if the Council follows the middle of the road and refrains from issuing detailed instructions to the parties, merely calling upon them, say, to conduct negotiations aimed at settling their dispute? Does such a resolution terminate the entitlement of a Member State to rely on self-help?"⁵⁵

⁵² Ibid, p.511

⁵³ Schachter, "The United Nations Law in the Gulf Conflict", note 6 *supra*, p 458. This view was expressed by Bowett who argued that "the necessary measures have been taken [by the Council] must be determined objectively, as a question of fact" Bowett, W. *Self-Defence in International Law*, Manchester University Press, Manchester, 1958, p196

⁵⁴ Rostow, note 33 *supra*, p.513 This view was held by Sir Humphrey Waldock who argued that "once action in self-defence is in motion.....it requires an affirmative decision of the Council, including the concurring votes of the Permanent Members, to order the cessation of the defensive action." Waldock, H. *The Regulation of the Use of Force by Individual States in International Law*, 81 Recueil Des Cours, 1952, p 495-6

⁵⁵ Dinstein, Y. *War, Aggression and Self-Defence*, third edition, Cambridge University Press, Cambridge, 2001, p 188-9. This view was also held by the UK during the Falklands Island Crisis of 1982. The Argentine Government argued that a provisional demand by the Security Council for withdrawal and cessation of hostilities, constituted a "measure" that would terminate the right of self-defence, regardless whether it was complied with by the aggressor. See Letter dated 29 April 1982 from the Representative of Argentina to the President of the Security Council, *UN Doc. S/15014*, SCOR 37th Yr., Suppl. April- June (1982), pp. 53-54 In reply, the representative of the United Kingdom, Sir A. Parsons, stated, "The fact that Argentina has not

To lay down a condition that measures taken by the Council must be successful in order for the right of self-defence to be ceased, however, is to depart from the plain meaning of the text of Article 51, which contains no such rule. Nevertheless, it cannot be ignored that this view represents a logical understanding of the right of self-defence in light of the political realities, given that the Council is a political body affected by political considerations. Moreover, Article 51, although it was created to protect the legal right of States to defend themselves, takes into account the political reality. As Bowett properly observed, Article 51 refers to “measures necessary to maintain international peace and security”, not “measures necessary to protect legal rights and legitimate interests of the State attacked.”⁵⁶ Theoretically, such rights and interests could be held to be encompassed by the former phrase. However, the reality is that a “political” decision by the Council is always possible. The risk exists, therefore, that the individual member’s legal rights may be subordinated to the political considerations involved.⁵⁷ In that case, indeed, it would be implausible to suggest that the injured State has lost its right of individual or collective self-defence on account of the political considerations and when there is a clear shortcoming in the Council’s action in relation to the seriousness of the situation. This was exactly the case in the Iran-Iraq War, when the Council, because of the political factors involved, clearly failed to address the seriousness and gravity of the situation;⁵⁸ consequently, it could be suggested that Iran had the right to continue its measures of self-defence after it became clear that the Council has failed to take effective action.

withdrawn its armed forces from the Falkland Islands, contrary to the demand in paragraph 2 of Resolution 502 (1982), is sufficient to indicate that the decision of the Council has not, in fact, been effective to restore international peace and security because of Argentina’s refusal to comply.The true position is that, in the face of Argentina’s flagrant and open violation of Resolution 502 (1982), the United Kingdom is exercising its inherent right of self-defence.” Letter dated 30 April 1982 from the Representative of the United Kingdom to the President of the Security Council, *UN Doc. S/15017*, SCOR 37th Yr., Suppl. April- June (1982), pp. 55-56

⁵⁶ Bowett, note 53 *supra*, p 196-7

⁵⁷ Ibid

⁵⁸ See chapter 2, section B.1

This argument is not disputed. Even scholars who take the view that once the Security Council has seized the matter in its agenda, the “inherent” right of self-defence becomes “dormant”, admit that the suspended right of self-defence might once again become applicable if the Council made it clear that it could not deal effectively with the problem or if it found itself prevented from taking necessary measures.⁵⁹ Mullerson, in light of Iraq’s continuation to occupy Kuwait despite the economic sanctions, argued that if, for some reason, the Council had not ultimately authorized military action against Iraq in Resolution 678, then Kuwait and its allies would be entitled under international law to take armed measures in collective self-defence against Iraq.⁶⁰ However, in the present case, the assumption made in favour of the right of collective self-defence under Article 51 and the arguments involved is hypothetical.

From the outset of the crisis, the general opinion was that the Security Council was acting vigorously to bring an end to the crisis. Indeed, the Council worked as it was supposed to work according to the design of its framers. The Council was not blocked by veto, nor could it be argued that it had failed to address the situation with appropriate gravity or to adopt measures with real impact or to strengthen those measures as the need became apparent. The Council, as a body, the coalition forces, and the legitimate government of Kuwait (in exile) all worked together in harmony to achieve the ultimate goal of liberation of Kuwait and repel the Iraqi aggression. There was no sign of disagreement between those parties in order to suggest that the coalition forces abandoned the jurisdiction of the Council, which is the principal means to the use of force under the Charter system, and resorted to the right of self-defence, which became controversial after the involvement of the Security Council, to carry out their military campaign.

⁵⁹ Franck and Patel, note 33 *supra*, p 63

⁶⁰ Mullerson, note 33 *supra*, p 22-3. Chayes similarly argued that when there is a clear shortcoming in the Council’s action in relation to the seriousness of the situation, “it would be a plausible argument that the Council was simply not exercising its functions, so that the preemption contemplated by Article 51 when the Council was truly addressing the situation does not come into operation.” Chayes, note 22 *supra*, p 6

This argument is supported by the fact that the coalition forces did not act before the adoption of Resolution 678. They not only waited for the authorization of force, but persuaded the Council to issue such an authorization. If they were acting on the basis of Article 51 it would not have been necessary to wait for Resolution 678. Furthermore, after the adoption of that resolution, the coalition forces waited further for the elapse of the deadline set out in the resolution (15 January 1991) to commence their military operation. This attitude, *per se*, affirms that they were acting on the basis of the Security Council authorization.

From another point of view, as mentioned above, the Council affirmation of the right of self-defence in Resolution 661 was to rule out the conclusion that the right had been suspended.⁶¹ Implicitly, however, this pronouncement can be considered as an assertion of the general rule, that the Council involvement in the matter automatically suspends the right of individual or collective self-defence and, therefore, the Council intended to make an exception to that rule. If the general rule was that the right of self-defence continues to apply until the measures prove successful, there would be no point in such affirmation. Furthermore, in contrast to Resolution 661, Resolution 678 did not mention Kuwait's right of individual or collective self-defence. This omission indicates that the Council considered that any subsequent action will be based solely on the authorization issued in that resolution. Consequently, the previous permission of self-defence, alongside the economic sanctions, expired with the adoption of Resolution 678.

To conclude, the military campaign against Iraq in 1991 was the first enforcement action of the United Nations Security Council under the authority assigned to the Council by Chapter VII of the Charter.⁶² The exceptional circumstances, which might have entitled the injured State to

⁶¹ See section A.1 above

⁶² The same view was held by the Secretary-General of the United Nations, Ambassador Perez de Cuellar, who argued that Kuwait's right of individual and collective self-defence no longer applied, because the response was delayed, eventually by more than five months. *Washington Post*, 9 November, 1990, at A30, col.5. It is certainly true that under customary international law, action in self-defence should be taken

eschew this rule, were not present in this case. Nevertheless, the US-led coalition was legally justified to use armed force on basis of Article 51, even in the absence of a further attack by Iraq or authorization of the Security Council. Such an action would be legally permitted, not because the right of self-defence was still valid after the interference of the Security Council, but because the Council exempted this case from the general rule and allowed the exercise of self-defence alongside the economic sanctions imposed by it.

Section C: New formula of collective action under Chapter VII

The formulation and language of Resolution 678, at the time of adoption, was unprecedented and, therefore, provoked much criticism and was rejected by some Council Members who described the text of the resolution as “broad and vague...a classic example of authority without accountability”⁶³ and claimed it “violated the United Nations Charter.”⁶⁴ In the legal literature, the language of the resolution has been taken as evidence that the Gulf campaign was a collective self-defence not an enforcement action.⁶⁵ This formula of “authorization”, however, set a

exercised as quickly as practicable, and should be confined to what suffices to remedy the original offence. However, in practice, the speed of response would vary from one situation to another, according to the circumstances surrounding each individual case. Hence, the time between the initial attack and the response must be determined objectively, as a question of fact and according to circumstances. For example, it was several years after the Pearl Harbor raid, before the United States was able to replace the ships destroyed by the Japanese; however, it was never suggested that for this reason the United States’ right to fight back expired. Legally speaking, neither under customary international law nor under the Charter is there a fixed time or even suggested period for the victim State to fight back. This condition of immediacy in response is very expendable and has endless flexibility, but, in any event, the assessment of the timeliness and reasonableness of any self-defence action rests with the responding countries and, under appropriate circumstances, the Security Council. In the case of Kuwait, however, the Security Council’s affirmation of the Kuwaiti right of individual and collective self-defence in Resolution 665 of 25 August 1990 more than three weeks after the initial invasion indicates that the Council confirmed the validity of the right. In other words, the Council did not require immediate countermeasures right after the invasion. Furthermore, in confutation of the Secretary-General’s Statement, it could be argued that countermeasures were already underway by the deployment of the American troops in the area immediately after the attack, which is considered the first phase in fighting back. These steps taken by “States co-operating with government of Kuwait” had been approved by the Council. Therefore, although the view presented here suggests that the action taken by the coalition forces was an enforcement action, the argument advanced by the Secretary-General cannot be relied on. For a similar view see Rostow, note 33 *supra*, p.513

⁶³ Statement by the Representative of Yemen, *UN Doc. S/PV. 2963*, note 26 *supra*, p 32

⁶⁴ Statement by the Representative of Cuba, p 52

⁶⁵ See note 70 *infra*

precedent for subsequent situations in which forcible action was deemed appropriate.⁶⁶ This section highlights this newly invented “authorization technique,” its legal basis, and the consequences of the formula of authorizing or calling upon member States to act on behalf of the Security Council.

C.1 The innovation of the authorization technique in Resolution 678

Resolution 678 of 29 of November (1990), after recalling and reaffirming all the previous eleven resolutions concerning the crisis, noted that, “despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement resolution 660 (1990)... in flagrant contempt of the Security Council.” As a result, the Council “authorize[d] member States co-operating with the Government of Kuwait, unless Iraq on or before January 15, 1991, fully implements....the foregoing resolutions, to use all necessary means to uphold and implement the Security Council Resolution 660 and all subsequent relevant resolutions.” At first sight, this language seems to be merely recommendatory and not mandatory in style, against what was supposed to be an enforcement action under Chapter VII. In further deviation from the original model, the Resolution “request[ed] all States concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to” the foregoing authorization. This language clearly indicates that the Council did not assume responsibility for directing the action but merely required to be updated of the course of the action.

It was the first time in the Security Council’s history that it has adopted such a formula, one that was evidently not intended by the drafters of the UN Charter at San Francisco Conference in 1945. As shown in Chapter 1, actions to maintain international peace and security should be multilateral collective force used under United Nations auspices. This original model for the use of force necessarily requires a decision by the Security Council on the need to initiate force,

⁶⁶ Quigley, J. “The ‘Privatization’ of Security Council Enforcement Action: A Threat to Multilateralism”, 17 *Michigan Journal of International Law*, 1995-1996, p 254

operational control by the Security Council over the forces deployed, and power in the Security Council to determine when to cease hostilities,⁶⁷ in order to ensure that the use of collective force will be confined to pursuit of commonly held objectives of the international community.⁶⁸

Resolution 678, as it stands, lacks these essential characteristics. Therefore, some authors contended that the Council, by adopting this language, intended nothing more than to acknowledge the existing right of self-defence and encourage willing States to act under Article 51.⁶⁹ As expressed by Rostow, “Except for the word “authorizes,” the resolution is clearly one designed to encourage and support a campaign of collective self-defence, and therefore not a Security Council enforcement action.”⁷⁰ These views, however, were expressed before the same technique of authorization was used by the Council in other situations where the right of individual or collective self-defence was not present, for example, in Resolution 794 of 1992, concerning action in support of humanitarian relief operations in Somalia,⁷¹ and Resolution 929 of 1994, concerning security and protection for displaced persons, refugees and civilians in Rwanda.⁷² In those situations, the actions undertaken by the acting States could only be based on the power assigned to the Security Council by under Chapter VII of Charter, because Somalia and Rwanda were not subjected to external armed attacks that would activate Article 51; there were merely internal conflicts. To put it simply, if in Resolution 678 the Council was only referring to Article 51 and not using its powers under Chapter VII, on what grounds could the use of force in the cases of Somalia and Rwanda be justified?

⁶⁷ See Chapter 1, sections C.2 & C.3

⁶⁸ Quigley, note 66 *supra*, p 250

⁶⁹ Schachter argues that Resolution 678 merely “served the political purpose of underlining the general support of the United Nations for the military measures” being taken by the States already aiding Kuwait. Schachter, note 6 *supra*, p 460

⁷⁰ Rostow, note 33 *supra*, p.508-9

⁷¹ Security Council Resolution 794 of 3 December, 1992

⁷² Security Council Resolution 929 of 22 June, 1994

In fact, the Security Council, faced with the reality that no troops have been designated to it by member States as envisaged in Article 43, failed to follow the model planned by the framers of the Charter. As an alternative, it resorted to a new formula for military action, in which it authorized or called upon willing member States to execute the mission on its behalf but without its control.⁷³ This, however, does not prove conclusively that the Security Council intended, by this formula, not to assume jurisdiction on the matter and to make use of its powers under Chapter VII. The Council merely adapted to the current realities and adopted a practical method of achieving international action where true collective force was politically or financially possible. Furthermore, although the Council by this technique delegates considerable authority to the member States acting on its behalf to direct the course of action on the ground, however, it still possessed ascendancy in the situation, as will be discussed in section C.3 below.

C.2 The indeterminate legal authority for the authorization technique

Despite having frequently used the authorization technique, the Security Council has never gone beyond general references to Chapter VII to explicate how the technique conforms to its powers under the UN Charter.⁷⁴ Consequently, the exact basis of Resolution 678 in the UN Charter was not entirely clear. A number of possibilities were therefore available.⁷⁵ One was that a resolution authorizing military action would of necessity fall within Article 42 and would therefore have to fulfil the requirements of that article.⁷⁶ Another possibility is that the Resolution 678, similar to

⁷³ Quigley resembles this technique to the trend of capitalistic governments to privatize its national sectors, "To analogize to government policy in a domestic context, what the Security Council has done is to follow the trend toward privatization. Instead of carrying out military actions itself, the Council hires the work out to individual States, typically to States that have expressed an interest in doing so and which, as a consequence, may have private aims to pursue." Quigley, note 66 *supra*, p 250

⁷⁴ Ibid, p 254

⁷⁵ See generally Schachter, "The United Nations Law in the Gulf Conflict", note 6 *supra*, p 461-5; Weston, note 25 *supra*, p 518-22; Glennon, M. "The Constitution and Chapter VII of the United Nations Charter", 85 *AJIL*, 1991, p 75.

⁷⁶ Schachter, *ibid*, p 461. As mentioned in Chapter 1, it is widely held that the Council's authority to have recourse to military action under Chapter VII can only be found in Article 42. See Chapter 1, section C.2

the Korean case in 1950; the only precedent of a resolution leading to the use of force,⁷⁷ can fit under Article 39 in this sense.⁷⁸ Otherwise, Article 48, which imposes an obligation upon Member States of the United Nations, or some of them, “to carry out the decisions of the Security Council for the maintenance of international peace and security”, could be considered the basis of Resolution 678.⁷⁹ All these possibilities were debated in legal literature as the proper basis for Resolution 678.

However, it is undisputed that Chapter VII, in general, provides an adequate legal basis, as the ICJ concluded in the *Certain Expenses* case. In that case, the Court rejected the argument that the military action authorized by the United Nations in the Middle East and the Congo had to be based on Article 42. It declared, “The Court cannot accept so limited a view of the powers of the Security Council.”⁸⁰ The ICJ did not identify any other specific article as a basis for such action by the Security Council, but it indicated that the Council’s general powers to maintain and restore international peace and security justified a liberal interpretation of its authority.⁸¹ On that basis, in the case of Resolution 678, no further specification would be required than a broad reference to Chapter VII. The Council would rely on the wide scope of the Charter provisions. Indeed, taking a broader view, the terms of Articles 39, 42, 47 and 48 do not preclude a decision of the Security Council calling on Members, even if they have not concluded a special agreement to provide armed forces under Article 43, to take a specific enforcement action.⁸² In other words,

⁷⁷ See Chapter 1, note 74

⁷⁸ Glennon, note 75 *supra*, p 75

⁷⁹ See Chapter 1, section, C.4

⁸⁰ *Certain Expenses* case, ICJ Reports, 1962, p 167

⁸¹ See Chapter 1, section C.3

⁸² Kelsen, H. *The Law of the United Nations, A Critical Analysis of Its Fundamental Problems*, Stevens & Sons, London, 1951, p 756

there is no article in Chapter VII to prevent States from making such resources available, on voluntarily basis, in order to implement Council resolutions adopted under Chapter VII.⁸³

As against this view, it has been argued that the authorization issued by Resolution 678 was an exercise of the Council authority under Article 51.⁸⁴ In other words, this proposal suggests that when the intention is to counter an armed attack by one State against another, the authorization technique takes its validity from the provision for collective self-defence.

The difficulty with this view, however, is that Article 51 reads as an exception to the powers granted to the Security Council in Chapter VII. The purpose of Article 51 is to make it clear that until the Security Council deals with a matter, a State subjected to armed attack may defend itself — calling on other States, if necessary, for assistance. There is nothing in the text or history of Article 51 to suggest that this right of member States could be invoked by the Council as a method of acting itself.⁸⁵ Article 39 vests in the Security Council the obligation to deal with threats to the peace. There is no indication that the Security Council may fulfil this responsibility by authorizing action by individual States, itself taking no control over either the initiation of use of force or its subsequent course.⁸⁶ In addition, this proposal is particularly problematic in the case of Kuwait. If Resolution 678 is viewed as based on Article 51 and therefore to amount to a delegation of authority in relation to the use of military action in collective self-defence, the adoption of Resolution 678 on these grounds would be a new interpretation of the Charter. It would seem inconsistent with the framers' apparent intention in Article 51, which was to safeguard mutual defence and collective security pacts and arrangements, which were not

⁸³ Sohan, L. "The Authority of the United Nations to Establish and Maintain a Permanent Force, 52 *AJIL*, 1958, p 230

⁸⁴ Schachter, "The United Nations Law in the Gulf Conflict", note 6 *supra*, p. 459

⁸⁵ See Chapter 1, section D.2

⁸⁶ Quigley, note 66 *supra*, p 270

involved in the Kuwait crisis.⁸⁷ This view was advanced by the majority of scholars who suggested that the right of collective self-defence under Article 51 was available only for States that had concluded mutual defence and collective security pacts and arrangements prior to the present conflict. Kelsen, for example, argued that “collective defence exists if two or more States organize their defence against attack from third States by concluding a treaty obliging or authorizing the contracting parties to assist one another in case one of them is attacked by third State.”⁸⁸

In the context of the Kuwait crisis, this proposition may explain why the Council, in Resolution 678, referred to “Member States co-operating with the government of Kuwait”, not to “States acting in collective self-defence with the government of Kuwait.” The Council, however, did not indicate clearly whether such assistance must have been requested by the victim of the original attack, as held by the International Court of Justice in the *Nicaragua* case,⁸⁹ but this matter did not arise in the Iraq-Kuwait case, since Kuwait had expressly requested assistance.⁹⁰

C.3 The lack of Security Council’s control over Operation Desert Storm

As previously illustrated, nothing in Articles 42-48 precludes a decision of the Security Council being carried out by an individual State or a group of States, through their own armed forces.

⁸⁷ Weston, note 25 *supra*, p.520. As illustrated in Chapter 1, the origins of Article 51 sprang from the discussion regarding regional arrangements. See Chapter 1, section D.2

⁸⁸ Kelsen, note 82 *supra*, p 792; see also Bowett, note 53 *supra*, p 216-18; Higgins, R, *The Development of International Law through the Political Organs of the United Nations*, Oxford University Press, Oxford, 1963, p 209-10; Goodrich, E, Hambro and Simons, *Charter of the United Nations*, the Brookings Institution, Washington, 1969, p 349-51

⁸⁹ *Nicaragua Judgment*, ICJ Reports, 1986, p 105, para 199

⁹⁰ In a letter dated 12 August, 1990 from His Excellency Sheik Jabar al-Ahmed al-Sabah Amir of the State of Kuwait to President George Bush, he stated, “I am writing to express the gratification of my government with the determined actions which the Government of the United States and other nations have taken and are undertaking at the request of the Government of Kuwait to deal with Iraqi aggression against Kuwait. It is essential that these efforts be carried forward and that the decisions of the United Nations Security Council be fully and promptly enforced. I therefore request on behalf of my government and in the exercise of the inherent right of individual and collective self-defence recognized in Article 51 of the UN Charter that the United States Government take such military or other steps as are necessary to ensure that economic measures designed to fully restore our rights are effectively implemented. Further, as we have discussed, I request that the United States of America assume the role coordinator of the international force that will carry out such steps.” See in Moore, note 21 *supra*, p 152

The same, however, is not true as to the command and direction of the action. Article 47 makes clear that the forces deployed for an enforcement action under Chapter VII should be unified by being brought under the command of the Military Staff Committee, which functions under the control and strategic direction of the Security Council.⁹¹ In other words, the “Security Council is supposed to exercise—directly or indirectly—the function of a commander-in-chief of the armed force.”⁹²

In Resolution 678, however, no role for the Military Staff Committee was established.⁹³ The Council only “request[ed] all States concerned to keep the Council regularly informed on the progress of actions.”⁹⁴ Thus, the Council plainly took a hands-off approach in regard to the course of military operations on the ground.⁹⁵ Weston rightly argued, “Surely this is not what the UN founders and Charter drafters had in mind.”⁹⁶ In the Security Council, two members challenged this approach. The Representative of Yemen expressed concern that the Security Council would have no control over the forces deployed, although their actions would have been authorized by the Security Council.⁹⁷ The delegation of Malaysia, similarly, pointed out that the clear system of reporting and accountability normally associated with Security Council

⁹¹ See Chapter 1, section C.2. Falk argues that the Security Council has “an obligation to control the definition of war goals, the means chosen to achieve them and to use its authority to impose a ceasefire.” Falk, R., “Questioning the UN Mandate in the Gulf”, *IFDA Dossier*, 1991, p 82

⁹² Kelsen, note 82 *supra*, p 763-4

⁹³ Schachter, “The United Nations Law in the Gulf Conflict”, note 6 *supra*, p. 459-60

⁹⁴ The Council was in fact behind the scene during the course of action. No Council meetings on the situation in the Gulf were held from November 29, 1990, when Resolution 678 was adopted, to February 14, 1991, when a secret meeting took place to discuss the political aspects of the end of the war. Even, the initial ceasefire in the Gulf war was secured, not by a Security Council resolution but by President Bush’s ultimatum of February 28, 1991. Moreover, whereas the symbolic panoply of the United Nations flag and other emblems characterized the UN-authorized force in Korea; these symbols have been omitted in this case. Rostow, note 33 *supra*, p 508-9

⁹⁵ This approach was favoured by the US administration. In a Hearing before the Senate Commission, Secretary of State, James Baker, stated that “if this were done you being getting into questions of whether or not there should be a U.N command of forces, whether or not the Military Staff Committee should give directions to the multinational forces, and questions of that kind, which we don’t think, under these circumstances, are things that we ought to invite.” U.S. Policy in the Persian Gulf: Hearings before the Senate Commission on Foreign Relations, 101st Congress, 2nd Session., 1990, p 157

⁹⁶ Weston, note 25 *supra*, p.527

⁹⁷ Statement by the Representative of Yemen, *UN Doc. S/PV. 2963*, note 26 *supra*, p 32

authorized action, was absent in Resolution 678 (1990).⁹⁸ Iraq took advantage of the absence of a role for the Military Staff Committee to argue the illegality of Resolution 678. The Representative of Iraq, Mr Al-Anbari, argued, “Only collective action under the command and control of the Security Council, in co-ordination with the Military Staff Committee, can lead to the use of force against any country, and no individual Member State may be authorized to lynch a particular country for any reason.”⁹⁹

An evident risk of this approach is that the acting States may apply a level of force beyond that intended by the Security Council.¹⁰⁰ However, a careful analysis of the authorization technique demonstrates that the Security Council had not completely lost its ascendancy over the situation. It was the Council, rather than the acting States, that made the initial decision to employ military force, and set out the general objectives of the mission. Most importantly, the Council retained the power to adopt a new resolution to deal with the situation in case of excessive use of force or to terminate its authorization if it found that the objectives of the action have been achieved.¹⁰¹ From this perspective, it would be a misconception to suggest that the authorization technique completely eviscerates the Council the power to control the situation. Additionally, even in the absence of Security Council control, in fact, States acting on behalf the Council are fettered in their conduct by another rule of international law, that is, the proportionality of the degree of force employed. This customary rule necessitates that military measures taken by the belligerent should be necessary and proportionate for achieving the designated objectives, as will be discussed in detail in the ensuing section.

⁹⁸ Statement by the Representative of Malaysia, *ibid*, p 74

⁹⁹ *Ibid*, p 19

¹⁰⁰ Quigley, note 66 *supra*, p 266

¹⁰¹ See Chapter 4, section C.4.2

Section D: Limits and objectives of the Gulf military campaign

In light of the Security Council's apparent intention to leave the strategic control and day-to-day command of the coalition action to the participating States, during the Gulf conflict many questions arose regarding the geographical scope of the coalition's attacks, the methods and means of warfare employed, and the consequences of war in terms of the severe destruction of the Iraqi infrastructure and the loss of many civilian lives.¹⁰² A legal debate was also centered on whether the American-led coalition was legally justified in taking its military operation to the source of aggression and overthrowing the aggressive regime of Saddam Hussein.¹⁰³ This section examines the proportionality of the degree of force employed in the Gulf conflict. It will start by reviewing the different interpretations of the condition of proportionality of the coercive response and whether it restricts the measures taken only to those needed to halt or repulse the aggression, or permits wider actions.

D.1 The condition of proportionality

Under contemporary international law, the principles of necessity and proportionality are crucial criteria governing any use of force in international relations—whether in self-defence or enforcement action under the authority of the Security Council—and form an integral part of the law of warfare. The United Nations Charter itself does not expressly spell out the specific legal restrictions. Instead, it refers to customary international law embodying them. As the International Court of Justice in the *Nicaragua* case observed, the Charter “does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the

¹⁰² Schachter, “The United Nations Law in the Gulf Conflict”, note 6 *supra*, p. 465-467; Weston, note 25 *supra*, p 529; Gradam, J. “Proportionality and Force in International Law”, 87 *AJIL*, p 391; Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, second edition, Basic Books, New York, 1991, p xx. Several humanitarian organizations also expressed concerns about the loss of civilian life as a result of the coalition forces' bombing campaign in Iraq. They also voiced their concerns regarding the massive destruction of Iraq's infrastructure. See, for example, Amnesty International, *Report on the Gulf War*, (1991); Human Rights Watch, *Needless Deaths in the Gulf-War*, Human Rights Watch, New York, 1991.

¹⁰³ Dinstein, note 55 *supra*, p 211-2, p 234-5; Rostow, note 33 *supra*, p.514

armed attack and necessary to respond to it, a rule well established in customary international law.”¹⁰⁴ In the legal literature, the condition of proportionality has been discussed mostly in relation to military actions taken by a State acting in self-defence. In the context of enforcement action under the authority of the Security Council, this condition did not attract much attention seemingly because it is supposed that the military forces will be deployed under the control and direction of the Council which will restrict the military measures employed to only those proportionate. However, since the authorization technique applied by the Council in recent years delegates the powers to control and direct the course of hostilities to the acting States, this assumption no longer applies and emphasis should be placed on the proportionality of the actions taken by States acting on behalf the Security Council. During the Gulf war of 1991, the Secretary-General, Javier Perez de Cuellar, referred to the need for reflection on the “mechanisms required for the [Security] Council to satisfy itself that the rule of proportionality in the employment of armed forces is observed.”¹⁰⁵ It is, however, undisputed that proportionality is a component of use of force by way of UN enforcement action.

The classical view of proportionality is that military measures employed should be confined to those which are proportional to the initial aggression and essential to respond to it.¹⁰⁶ Hence, even where resort to force is justified and perceived as necessary, the acting States will be violating this customary rule “if the degree of force which it employs becomes excessive.”¹⁰⁷

This view presupposes constant evaluation and assessment of the conduct of the military

¹⁰⁴ *Nicaragua Judgement*, ICJ Reports, 1986, p 94, para.176. In the case of the Gulf war 1991, the condition of the necessity of initiating force against Iraq, as illustrated in the first section of this Chapter, has been satisfied. See section A.3 above. This part will focus on the condition of proportionality

¹⁰⁵ *Report of the Secretary-General on the Work of the Organization*, 1991, UN Department of Public Information, *UN Doc. DPI/1168-40923* (1991)

¹⁰⁶ Bowett, note 53 supra, p 269; Brownlie, I. *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1963, p 261-4; Waldock, H. *The Regulation of the Use of Force by Individual States in International Law*, 81 *Recueil de Cours*, 1952, p 463

¹⁰⁷ Greenwood, C. “Self-defence and the Conduct of International Armed Conflict”, in Dinstein, Y. (ed.) *International Law at a Time of Perplexity*, Martinus Nijhoff Publishers, the Netherlands, 1989, p 274

operations in the course of war.¹⁰⁸ The key factor in assessing the proportionality of the actions taken is the legitimacy of the goals these actions were designed to achieve, not the equation with the initial attack by the aggressor.¹⁰⁹ In the case of occupied territories, such as Kuwait, proportionality, according to this approach, confines the military action to repel the attack, expel the invader and restoration of the territorial *status quo*.¹¹⁰ In other words, recourse to military action can be used only to restore and preserve the territorial integrity or political independence of the injured State as it was before the first strike, but not to justify the use of armed force simply to win the war.¹¹¹ This view was expressed by Judge Higgins, in her dissenting opinion in the Nuclear Weapons Advisory Opinion. She argued that the approach is not to focus on the nature of the attack itself and ask what a proportionate response is, but rather to determine what is proportionate to achieving the legitimate goal under the Charter, the repulsion of the attack.¹¹² By implication, this implies that the continuation of the ‘defensive measures’¹¹³ after the aggressor has been driven back to the international boundaries in order to destroy the military capability of the aggressor or to impose a regime change would be disproportional and unlawful.

¹⁰⁸ Gardam argues that “proportionality remains relevant throughout a conflict. A state cannot assess proportionality at the time of making the decision as to the appropriate response to an armed attack and then dispense with it” Gardam, J. *Necessity, Proportionality and the use of Force by States*, Cambridge University Press, Cambridge, 2004, p156

¹⁰⁹ McDougal and Feliciano observed: “proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary to promptly secure the permissible objectives.” McDougal, M.S and Feliciano, F. P, *Law and Minimum World Public Order, the Legal Regulation of International Coercion*, Yale University Press, New Haven, 1961, p 242

¹¹⁰ Higgins, R. *Problems and Process: International Law and How We Use It*, Oxford University Press, Oxford, 1994, p 232; Greenwood, “New World Order or Old? The invasion of Kuwait and the Rule of Law”, note 7 *supra*, p 164

¹¹¹ Lagoni, R. “Comments: Methods of Means of Warfare, Belligerent Reprisals, and the Principle of Proportionality”, in Dekker, I. and Harry, H. [eds], *The Gulf War of 1980-1988, The Iran-Iraq War in International Legal Perspective*, The Hague, Martinus Nijhoff Publishers, 1992, p 120. Greenwood also suggests defensive measures continue as long as the invader retains control over the territories of the defendant State. Greenwood, *ibid*.

¹¹² Dissenting Opinion of Judge Higgins, *The Legality of Threat or Use of Nuclear Weapons Advisory Opinion*, ICJ Reports, 1996, p 583-4

¹¹³ The terms “defensive situation” or “defensive action” are used in this section in their non-technical sense. They allude to the nature of conflict as it aimed at defending Kuwait against Iraq’s aggression, not to say that the Gulf campaign was carried under the authority of Article 51

D.2 Carrying response to the source of aggression

As against this view, it has been suggested that when the aggression has occurred and necessitates military response, there is the possibility of more such actions.¹¹⁴ Ago commented in a report to the International Law Commission, “it would be mistaken...to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the defensive action, and not the forms, substance and strength of the action itself.”¹¹⁵ The Report of ILC seemed to uphold this view, it concluded that “a State which is suffers the aggression cannot realistically be expected to confine its response strictly to the limits of what might just suffice to repel and end the attack.”¹¹⁶ This proposition means that the responding State or States may not stop their responsive measures when the aggressor has been driven back to the international boundary or opted to discontinue its act of aggression.¹¹⁷

This school of thought suggests that proportionality has a special meaning in the context of defensive war, and is not a suitable basis on which to judge the legitimacy of the defensive action. Once war is raging, defensive measures may be pursued to the total defeat of the enemy’s army regardless of the condition of proportionality. In Oppenheim’s view, after the outbreak of hostilities, “no moral or legal duty exists for the belligerent to stop the war when his opponent is

¹¹⁴ Schachter, O. *International Law in Theory and Practice*, Martinus Nijhoff Publications, the Netherlands, 1991, p 150-1

¹¹⁵ Addendum to Eighth Report on State Responsibility” by Reberto Ago, Agenda Item 2, 1980, II (1), 13 *ILC Yearbook*, 1980, p 69-70

¹¹⁶ Report on State Responsibility Ibid. p 69

¹¹⁷ See, for example, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, edited by Louise Doswald-Beck, Cambridge University Press, Cambridge, 1995, p 77; Greenwood, C. “Command and the Laws of Armed Conflict”, 4 *Strategic and Combat Studies Occasional Paper*, No. 4, 1993, p 7-8; Dinstein, note 55 *supra*, p 208-9

ready to concede the object for which war was made.”¹¹⁸ Dinstein argues that “an aggressor State may lose its appetite for continuing with the hostilities, but the victim State need not be accommodating... War of self-defence, if warranted as a response to an armed attack, need not be terminated at the point when the aggressor is driven back, and it may be carried on by the defending State until final victory.”¹¹⁹ This view is based on the argument that the legitimate aims of defensive action include the right to restore the security of the victim State, which might necessitate carrying the response to the source of aggression, destruction of the military capability of the aggressor or imposition of a regime change. Thus, the total defeat of the armed forces of the aggressor State would be necessary to achieve the goal of security.

Scholars who advocate this proposal argue that the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* indicates that the defending States is free to employ every means to ensure its security. Indeed, the Court did not rule out the possibility of using nuclear weapons “in an extreme circumstance self-defence, in which the very survival of a State would be at stake.”¹²⁰ It observed that “there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.”¹²¹ As to the condition of proportionality, the Court specially held that “the proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances.”¹²² This pronouncement has been interpreted to mean that the defending State, when its continued existence is in danger, may deploy nuclear weapons against its attacker, even if the latter has

¹¹⁸ Oppenheim, L. *International Law*, Vol. II, seventh edition (Lauterpacht, H. ed.), Longmans, London, 1952, p 225

¹¹⁹ Dinstein, note 55 *supra*, p 210-11. Similarly, Kunz argues that Article 51 “...gives the State or States exercising the right of individual or collective self-defence the right to resort to justified war, to carry this war to victory, to impose a peace treaty upon the vanquished aggressor.” Kunz, J, “Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations”, 41 *AJIL*, p 876-77

¹²⁰ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, p 266

¹²¹ *Ibid*

¹²² *Ibid*, p 245

used only conventional weapons.¹²³ Thus, according to this view, when it is a question of survival, the defending State can employ whatever measures are necessary to ensure its security, irrespective of proportionality to the weaponry deployed by the aggressor.

Analysis of both views shows that while there is considerable divergence as to the scope of defensive action that is warranted in the face of an aggression and how far the defendant State could carry its response, however, the aim of the defensive action under both views is legitimate and can be justified under the UN Charter. On the one hand, the classical view of the condition of proportionality between the force employed and the initial aggression, and the necessity of the measures taken, is in conformity with the values and principles of the UN Charter to minimize the use of armed forces in international relations. Furthermore, it could be argued that in the case of occupied territories, the necessity of coercion measures expires once the aggressor has been driven back to the international boundaries. Thereafter, the obligation of peaceful settlement of disputes comes into play and, hence, the defendant State should seek peaceful solution for the dispute. In other words, the principle of peaceful settlement of the dispute is to be activated once the *status quo* has been restored. Finally, interference in the territorial sovereignty or political system of the defeated aggressor to destroy its war-making power or to impose regime change, for example, violates the principle of non-interference emphasized in the UN Charter. However, this view of the requirement of proportionality leaves many problems unsolved. It may be questioned, for example, whether the requirement of proportionality under the Charter rules out action taken to remove a continuing threat. If it is accepted that defensive measures are warranted only to repel or halt the attack, would proportionality be violated by measures intended to prevent the recurrence of such an attack and restore the security of the State?¹²⁴

¹²³ Dinstein, note 55 *supra*, p 210

¹²⁴ Gradam, *Necessity, Proportionality and the use of Force by States*, note 108 *supra*, p 165

In support of the non-restrictive view, it could be argued that the ultimate goal of the UN Charter is to establish international peace and security. Therefore, the legitimate goals of defensive action under the United Nations Charter extend to restoration of security of the State after an aggression and the removal of further threat from the same source of aggression. Furthermore, an aggressor State which considers itself the victim of an excessive or disproportionate response has provided at least the primary cause for such action, by its own original breach of Article 2(4). A disproportionate degree of force in response to aggression is less unjust than the notion, which may be derived from the Charter, that a State is to remain threatened by an aggressive regime that can resume its military activities at any time.¹²⁵ From another standpoint, it could also be suggested that since proportionality is a customary rule, and the Charter did not express restriction on the conduct of hostilities, but rather refers to the customary law, as soon as an aggression has developed, belligerent behaviour is governed by *ius in bello* only. Hence, belligerents are not restrained by the obligations of the UN Charter in their conduct of hostilities. In fact, the principle of proportionality is an elusive one with “endless flexibility.”¹²⁶ The assessment of its application in such a use of force will depend on unlimited strategic factors such as the geographical context, the area of the attack that they are designed to repel, the temporal scope of the conflict, the choice of methods or means of warfare and the degree of coercion that may be applied against neutrals.¹²⁷ In addition, the degree of force employed will depend greatly on the military capability and attitude of the aggressor. This implies that the decisions needed to ensure the proportionality of a forceful response will not be confined to the planning stage but extend to senior command-level on the battlefield. Legally, the distinction between the aims of an action and the means to accomplish them are not always clear. States will

¹²⁵ Simma, B. *The Charter of the United Nations; A Commentary*, Volume 1, second edition, Oxford University Press, Oxford, 2002, p 792

¹²⁶ Gardam, “Proportionality and Force in International Law”, note 102 *supra*, p 412

¹²⁷ Greenwood, “Self-defence and the Conduct of International Armed Conflict”, note 107 *supra*, p 275

interpret these matters differently, depending on strategic factors and individual circumstances. These realities support the view that proportionality of the action is more appropriately assessed by reference to the rules of *ius in bello*, not to the principles and values of the UN Charter.

D.3 State practice regarding the condition of proportionality

State practice in the post-Charter era shows a range of defensive responses, reflecting different views as to the extent to which the destruction of the enemy is justified in order to repulse the attack and establish security. In some cases, defending State took the view that defensive action may include carrying the combat to the source of aggression. For example, following the Japanese attack on Pearl Harbor, the United States sought the unconditional surrender of Japan and its response was not confined to stemming the tide of aggression.¹²⁸ The view that the defensive action may include the destruction of the aggressor's military capability was also explicitly articulated by the UK in the context of the Yemen incident of 1964. In that case, Britain took counter-measures on Harib Fort in Yemen following the latter's alleged bombardment of Saudi territory. In the Security Council, Sir Patrick Dean, the United Kingdom Representative, argued that in order to minimize loss of life and danger to civilian property, the UK had focused on an isolated target. "To destroy the fort", he said, "...with the minimum use of force was therefore a defensive measure which was proportionate to and confined to the necessities of the case."¹²⁹ This statement can be interpreted to support the view that in reality the principle of proportionality would mean adherence to the rules of *ius in bello*, in the sense that the consequences of the action must be minimal in terms of wastage of life, property and resources, but not to preserve the enemy's military capability. In contrast to this position, in the context of the Falklands War, the UK neither carried its response into Argentinean territory nor claimed such a right. The aim of the UK action was to remove Argentina from the Islands and,

¹²⁸ Dinstein, note 55 *supra*, p 211

¹²⁹ Statement by the the United Kingdom Representative on 2 April 1964, *UN Doc. S/PV 1106*

apparently, the UK view was that this goal could be achieved without attacking Argentina itself and the campaign was in fact confined to the Islands.¹³⁰ Greenwood, however, argues that the United Kingdom was entitled to use force not only to regain possession of the Islands but also to guarantee their future security against further attack.¹³¹

A relatively straightforward example of a disproportionate response, in the light of all the relevant factors, is the United States' invasion of Panama in 1989.¹³² The action was ostensibly an exercise of the right of self-defence to protect American lives in danger. Quite apart from the doubt as to whether the right of self-defence extends to the protection of nationals abroad, the American action was clearly disproportionate.¹³³ The acts cited as the trigger for invoking the right of self-defence were the death of one United States soldier and the threatening of two others by Panamanian Defence Force personnel. The United States responded by carrying out a full-scale invasion, involving the loss of many civilian lives, destruction of property and the overthrow of the Noriega regime. America's action was condemned by States and commentators.¹³⁴

The view that defensive action may justify carrying response to the source of aggression and overthrow of the aggressive regime was massively upheld by after the events of 9/11. In 2001, the USA with UK assistance, in pursuit of the parties responsible for the 9/11 attacks, launched a military operation, called "Enduring freedom", against Afghanistan. The espoused purpose was to destroy the Afghan bases and infrastructures of the Al-Qaeda terrorist organization, and to overthrow the Taliban authorities, who allegedly actively assisted, supported, and even used the terrorist organization. Despite the different contexts between the defensive action taken in

¹³⁰ Higgins, *Problems and Process: International Law and How We Use It*, note 110 *supra*, p 232; Greenwood, "Self-defence and the Conduct of International Armed Conflict", note 107 *supra*, p 275

¹³¹ Greenwood, "Command and Laws of Armed Conflict", note 117 *supra*, p 7-8

¹³² Gradam, J. *Necessity, Proportionality and the use of Force by States*, note 108 *supra*, p 166

¹³³ *Ibid*

¹³⁴ See Chapter 8, section C.1.2

response to armed attack or invasion and actions taken in response to terrorist attacks, the US carried its response to the Afghani territory and overthrew the Taliban regime. Most of the world States supported the US in doing so and the Security Council explicitly accepted this action and it was not seen as disproportionate or unlawful.¹³⁵

To conclude, over the years of the post-Charter era, State practice shows that States have at times been reluctant to relinquish the freedom of action they had under customary international law, prior to the adoption of the Charter.¹³⁶ Despite the existence of contrary State practice, there is still an uneasy consensus that the Charter marked a turning-point in the law on the use of military action and requires States to confine themselves to the level of force needed to repel the aggression and respond to it.¹³⁷ The inconsistencies in State practice can be explained to a great extent by the fact that each case depends on individual circumstances. Furthermore, the extent to which interference with the territorial rights of an aggressor State may be consistent with limitations inherent in proportionate self-defence will, again, differ from case to case. Sometimes the defensive response will warrant the invasion of the territory of the aggressor State only to reduce or destroy its military capabilities and, at the most extreme, to overthrow the aggressive regime.

As against this view, Gardam argues that actions taken by States in the context of the extent of the invasion of territory should be viewed as violations of the requirement of proportionality, rather than the establishment of a new rule.¹³⁸ However, international law develops through the practice of States, and particularly since the event of September 11, such practice seems to display a tendency towards the acceptance of a more extensive action against incumbent regimes that are perceived to threaten the stability and security of the international community. This is

¹³⁵ See Chapter 7, section B.6.1

¹³⁶ Brownlie, note 106 *supra*, p 231-3

¹³⁷ Gardam, J. *Necessity, Proportionality and the use of Force by States*, note 108 *supra*, p 138

¹³⁸ *Ibid*, p 164-5

not to suggest that carrying response to the source of aggression became a new rule of international law, but, depending on the context, such comprehensive measures, encompassing the total destruction of the military forces of an aggressor State and the toppling of a perceived hostile regime, may sometimes be seen as acceptable and proportionate. Admittedly, such a decision or recommendation, more appropriately belongs to the Security Council. Should the Council disagree, then the acting State or States runs the risk of its continued action being characterized as disproportionate or even a “threat to the peace, breach of peace, or act of aggression”

D.4 The proportionality of the coalition forces action against Iraq in 1991

Resolution 678, as mentioned above, authorized member States co-operating with the Government of Kuwait, to use “all necessary means” to implement the Council’s resolutions about Kuwait if, by 15 January 1991, Iraq had not withdrawn its troops from Kuwait. The Resolution went further to call for the restoration of “international peace and security in the area.”¹³⁹ At first sight, it appears that the legitimate aim of the authorized force was to liberate Kuwait by ousting Iraqi troops from its soil and restore the legitimate government of Kuwait to power. According to the strict view of the requirement of proportionality, any further measures taken by the coalition after Iraq had been driven back to the international frontiers would be disproportionate and illegal. Some writers, on the other hand, took the view that *Operation Desert Storm* could legitimately extend to action in Iraq to destroy the latter’s military capability and overthrow the regime of Saddam Hussein.¹⁴⁰ This view was based on the language “to restore international peace and security in the area.” Indeed, in the absence of any more specific definition, these words could justify wider military actions rather than only liberating Kuwait.

¹³⁹ This later phrase will be interpreted and discussed in detail, in the context of reinforcing the disarmament regime imposed on Iraq after the cease-fire, in the following Chapter. However, for the purpose of this Chapter, this phrase will be looked at in relation to the military operation carried out on 1991.

¹⁴⁰ Dinstein, note 55 *supra*, p 234-5; Rostow, note 33 *supra*, p.514

Thus, it seems that this phrase was in line with the non-restrictive view, indicating that the coalition forces were empowered to invade the Iraqi territory and carry their military operation to the source of aggression.

As a factual consideration at the time of the Gulf war 1991, as shown in the preceding chapter, it was evidenced that Iraq possessed chemical and biological weapons and was seeking nuclear weapons. Iraq's conventional armed forces were apparently—in terms of size and equipment—one of the most powerful armies in the region. In addition, the government headed by Saddam Hussein in Iraq was widely perceived as a hostile and aggressive regime motivated by expansionism and territorial ambitions. In light of these considerations, it seems justified for the coalition forces not to terminate their military operations at the point when Iraq was driven back to the international boundaries. It would appear reasonable and proportionate to extend the response into Iraqi territory to reduce or destroy its military capabilities and even to the extent of overthrowing Saddam Hussein's regime, in order to achieve the objective of security of the State of Kuwait. Additionally, if the US-led coalition opted to do so, such interference with Iraq territorial sovereignty would be covered by the Security Council authorization to “restore international peace and security in the area.” In fact, the coalition forces chose to confine the aim of their military campaign to returning Iraq to the international boundaries. That decision has never been fully explained by the US and its allies. When the UK Defence Secretary was asked, he stated, “We were part of a coalition acting under the authority of the United Nations, for the purposes authorized by the Security Council and none other. Had we tried to go beyond the scope of those authorized purposes, the coalition would have fallen apart.”¹⁴¹ It is unclear from this answer whether the coalition actually took the position that the destruction of the

¹⁴¹ HC Debs., vol. 216, 13 January, 1993, quoted in Gray, C. “After the Cease-Fire: Iraq, the Security Council and the Use of Force”, 65 *BYIL*, 1994, p 137

Government of Iraq exceeded what was authorized by Resolution 678.¹⁴² It seems, however, that the decision to terminate the military operations at the point of liberating Kuwait was merely for political considerations.

The coalition allies, whilst continuing to assert that their objective did not go beyond expelling Iraq from Kuwait, took the view that, bearing in mind Iraq's military capability, it was tactically necessary to take the response to Iraqi territory. As mentioned above, the actual conduct of the campaign, such as the massive aerial bombardment, the destruction of Iraq infrastructure and huge loss of lives was viewed by many writers and humanitarian organizations as disproportionate.¹⁴³ Michael Walzer suggests that the massive bombardment was designed for an unjust aim, namely, to overthrow Saddam Hussein's regime in Iraq.¹⁴⁴ David Hannay, the United Kingdom Representative at the Security Council at the time of the Kuwait crisis, commented on these accusations. He stated, "Some have suggested that military action being taken by the allies is in some way excessive or disproportionate and thus exceeds the "all necessary means" authorized in Resolution 678 (1990) to bring about the liberation of Kuwait. But the nature and scope of the military action is dictated not by some abstract set of criteria but by the military capacity of the aggressor, who has refused all attempts to remove him from Kuwait..... It is to that aim and in those specific circumstances that the force used must correspond."¹⁴⁵

In fact, as indicated above, the proportionality of action depends on a wide range of strategic factors. In addition, however sophisticated the coalition forces, Iraq was a defiant and tricky adversary. Therefore, it is difficult to arrive to any firm conclusion about the proportionality in all aspects of the coalition forces' military operations against Iraq.¹⁴⁶ However, in light of the

¹⁴² Gray, *ibid*

¹⁴³ Note 102 *supra*

¹⁴⁴ Walzer, note 102 *supra*, p xx

¹⁴⁵ *UN Doc. S/PV. 2977*, part II, Para. 72, 14 February 1991

¹⁴⁶ For a similar view see Gradam, J. "Proportionality and Force in International Law", note 102 *supra*, p 405

massive loss of civilians and almost complete destruction of the Iraqi infrastructure, it could be argued that some aspects of the *Operation Desert Storm* were disproportionate and inconsistent with the *ius in bello*. It seems that the coalition, by this massive destruction, aimed at destabilizing the government in Baghdad. But, at any rate, this aim was not the focus of the allies at this time; otherwise, they would have pressed harder to achieve it under the authorization umbrella of Resolution 678.

Conclusion

Iraq's invasion and purported annexation of Kuwait in August 1990 was an unprecedented act of aggression in modern history, challenging the global stability of the post-Cold War era and threatening international peace and security in the already turbulent Middle East. It was a further confirmation of the aggressive and hostile attitude of the regime in Baghdad and its ambitions for territorial expansionism, demonstrated beforehand by its aggression against Iran. However, for various political reasons, including the end of the Cold War, the reaction of the world community and the Security Council response to the Kuwait crisis was completely different from their previous attitude towards Iraq's prior aggression. From the onset of this crisis, the Security Council's firm and vigorous stance marked the revival of the collective security system established by the UN Charter.

Instantly after the invasion, the Council activated its powers and authorities under Chapter VII, imposing economic sanctions and a naval blockade against Iraq. Soon after, when these sanctions appeared to be ineffective to secure Iraq's withdrawal from Kuwait and the use of force was deemed to be necessary, the Council authorized its first ever enforcement action. However, faced with the absence of troops assigned to it by member States, the Council adopted a practical method of achieving international action where true collective force was politically or financially feasible, by delegating willing member States to execute the mission on its behalf.

Indeed, by adopting this method, the Council eschewed the original model of collective security system envisaged in Chapter VII and relinquished its Charter defined role of controlling and directing the course of action through a Military Staff Committee. However, a careful examination of this formula shows that while the Council assigns its powers and authorities over the strategic control and day-to-day command of the hostilities to the participating member States, it still possesses its ascendancy and ultimate control over the situation. Furthermore, even in the absence of the Military Staff Committee, in fact, the coalition forces were not unfettered in their conduct; they were confined by the rule of proportionality which obligated them to employ only the degree of force necessary to achieve the objectives designated by the Council. Therefore, practically, the lack of the Council's constant control over the action does not make much difference.

In the legal literature, some scholars have taken the lack of Council's control over the Gulf war alongside the fact that the coalition troops were already deployed in the Gulf region prior to the adoption of Resolution 678 to suggest that the Gulf campaign was carried out as a collective self-defence with the legitimate government of Kuwait under the authority of Article 51. This proposal, however, does not stand much scrutiny. Article 51 made it clear that the right of self-defence is only permissible "until the Security Council has taken measures necessary to maintain international peace and security." In addition, no such proposal has ever been suggested by the coalition allies themselves.

Finally, examining the legal theories of the condition of proportionality and State practice shows that there is a shift towards the acceptance of more comprehensive action against incumbent regimes that appear to pose a danger to the stability and security of the international community. From this perspective, having in mind the military capabilities of Iraq and its unmistakably aggressive and defiant attitude, it seems that the coalition forces were justified in taking their

response to that source of aggression and overthrowing the government in Baghdad. If they had opted to do so, such an action would be covered by the language of Resolution 678, “to restore international peace and security in the area.” In addition, if they had taken that decision at the time, it would be far less controversial rather than leaving nearly 12 years to elapse before doing so. Indeed, as expressed by Gray, “the Security Council has paid the price for the decision of the coalition not to destroy Saddam Hussein’s regime under the authorization.”¹⁴⁷

¹⁴⁷ Gray, note 141 *supra*, p 136-7

Chapter 4

Interpretation of Security Council Resolutions 678 and 687

Introduction

The primary legal ground invoked by the US and the UK to justify the invasion of Iraq in 2003 was the Security Council authorization.¹ Two interrelated Security Council resolutions which were claimed to provide authority to use force against Iraq after the liberation of Kuwait. The first was Resolution 678.² It was argued that its mandate still governed the situation and had not been terminated after Iraq had been driven out of Kuwait. Specifically, the argument was based on the language of the resolution which, according to the US and the UK approach, permitted the Council allies to “use all necessary means” not only to oust the Iraqi troops out of Kuwait, but also to “restore international peace and security in the region.”³ The second was Resolution 687, which laid down the conditions of cease-fire between Iraq and the coalition forces.⁴ The US and the UK maintained that any violation of these conditions gave the other party the right to resume fighting.⁵

These arguments, however, were rejected by some States such as China and Russia who argued that the mandate for force established by Resolution 678 was extinguished and that any resumption of fighting required a new explicit authorization from the Security Council.⁶ This counterargument implies two propositions; first, that the language of Resolution 678 cannot be

¹ See, for example, President Bush’s Address before the UN General Assembly (12 September 2002), 38 Weekly Comp. Press. Doc. 1529 (16 September 2002), *available at* <<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>> [Hereinafter President Bush’s Remarks] See also Letter dated 20 March 2003 from the Permanent Representative of the United States to the President of the Security Council, *UN Doc. S/2003/351*; Chapter 7, section D.2

² Security Council Resolution 678 of 29 November 1990

³ *Ibid*

⁴ Security Council Resolution 687 of 3 April 1991

⁵ Note 1 *supra*

⁶ Yoo, J. “International Law and the War in Iraq”, 97 *AJIL*, 2003, p 563

interpreted to cover the situation after the liberation of Kuwait has been achieved; second, that a material breach by Iraq of its obligations under Resolution 687 did not “automatically” give rise to the right of the coalition forces to suspend or terminate the cease-fire and resume hostilities without new explicit authorization of use of force by the Council.

This controversy triggers two important legal issues, which for a long time, appeared to have been comparatively abandoned in the legal literature. The first is regarding the method of interpreting Security Council resolutions, particularly, as to resolutions authorizing individual members to use force on behalf of the United Nations. As this method of authorization is likely to continue, in the absence of the UN’s own forces as envisaged by the founders of the Charter in Article 43, establishing a set of rules to be applied in interpreting Security Council resolutions is necessary. The second is pertaining to the legal rules governing the armistice agreements sponsored by the Security Council, especially, in case of material breach of a cease-fire agreement. As to the present study, examining these issues is crucial to determine the pertinence of the arguments forwarded by the invading powers, and hence, the legality of their action.

This chapter is concerned with the issue of interpretation of Resolution 678; the legal rules governing armistice agreements will be dealt with in the ensuing Chapter. The purpose of the present chapter is to investigate the exact scope of Resolution 678 and, accordingly, the validity of the interpretation advanced by the US and the UK. The chapter begins with an explanation of the legal nature of Security Council resolutions and the reason for subjecting them to the general rules of interpretation in international law. Then follows a revision of the theories and principles of interpretation including the Vienna Convention on the law of treaties and their applicability for interpreting the Security Council resolutions. The third section of this chapter interprets Resolution 678 according to the conclusions reached in the preceding section.

Section A: The legal nature of the Security Council resolutions

The Security Council, as an international institution, is a political forum where States convene to discuss issues related to international peace and security and to reach a decision (resolution) on the matter by voting. These resolutions (whether mandatory—adopted under Chapter VII—or recommendatory) are political decisions concluded by the members of this forum, motivated by political (not legal) reasons. Therefore, the legal nature of these instruments cannot be described as anything but international agreements between Member States of the Security Council.

The provisional draft of the International Law Commission defined a “treaty” as: “any international agreement in a written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.”⁷ Thus, in the legal sense, a Security Council resolution is an international agreement (or a treaty) concluded by a group of States (the fifteen Member States of the Security Council) in a written form and governed by international law. Consequently, these resolutions, like international treaties, should be subject to and governed by the rules of the law of treaties.

As to the issue of interpretation, it is acknowledged that the imprecision of any language is such that most legal documents, despite the care taken in drafting, will be amenable to more than one legally and logically conceivable interpretation.⁸ Security Council resolutions are no exception.

In addition, the United Nations Charter, like the Covenant of the League of Nations, does not

⁷ *Yearbook of International Law Commission*, 1962, p 161

⁸ Kelsen, H. *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, Stevens & Sons, London, 1951, p. xiii ff

give any organ authoritative power of interpretation.⁹ It therefore seems reasonable to argue that Security Council resolutions should be interpreted according to the general rules of treaty interpretation in international law. Support for this argument can be found in Article 5 of the Vienna Convention on the Law of Treaties, which stated that “the present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.”¹⁰ Security Council resolutions fell perfectly within the second category. An objection may be raised, however, that some States and permanent members of the Security Council have not yet ratified the Convention, and so are not bound by these rules.¹¹ Nevertheless, the Convention provisions on interpretation are part of customary international law. With regard to the rules set out in the Vienna Convention on the Law of Treaties, the ICJ has expressed that they may “in many respects be considered as a codification of existing customary law.”¹²

Section B: Theories and principles of interpretation and the Security Council resolutions

Traditionally, views on the matter of interpretation can be classified into three main schools of thought: the “intentions of the parties” or “founding fathers” school; the “teleological” or “aims and objects” school; and the ‘textual’ school. Their ideas are not necessarily mutually exclusive, and theories of interpretation may contain elements of all three.¹³ In addition, all three approaches may, in a given case, have the same practical implications; on the other hand they

⁹ Kunz, J. L. “Legality of the Security Council Resolutions of June 25 and 27, 1950”, 45 *AJIL*, p 138

¹⁰ Article 5 of the Vienna Convention on the Law of Treaties[Hereinafter Vienna Convention]

¹¹ Simma, B, *The Charter of the United Nations, A Commentary*, Volume 1, second edition, Oxford University Press, Oxford, 2002, p 18

¹² *Namibia Advisory Opinion*, ICJ Reports, 1971, p 47

¹³ Fitzmaurice, G. “The Law and Procedure of the International Court of Justice: Treaty Interpretation and other Treaty Points”, 28 *BYIL*, 1951, p 1

may also (although the differences may be more methodological or matters of emphasis rather than principle) lead to very different outcomes.¹⁴

Article 31 of the Vienna Convention on the Law of Treaties stated that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁵ Clearly the Convention adopted the textual approach as the primary method of interpretation; however, it did not completely disregard the teleological approach. Consistent with Article 31 of the Convention, in the jurisprudence of the International Court, many statements can be found which imply that it views the textual approach to treaty interpretation as established law. In particular, the Court has on a number of occasions emphasized that the function of interpretation does not extend to revising treaties, nor must an interpretation read into them anything that is not clearly expressed or implied in them.¹⁶ However, there are no mandatory rules on interpretation. Recourse to the various principles and maxims in this respect is discretionary, and the interpretation of documents has been characterized as something of an art, rather than an exact science.¹⁷ It might appear that, as a result of this non-obligatory character of these principles and the lack of any particular limitation to certain types of treaties or texts, there is substantial leeway for interpretation. Nonetheless, at any rate, these principles are boundaries that protect against arbitrary interpretation.

¹⁴ Ibid, p 2

¹⁵ Article 31 of the Vienna Convention

¹⁶ *Reports of the International Law Commission*, Draft Articles on the Law of Treaties and Commentaries, Part 3: Observance, Application and Interpretation of Treaties, printed in 61 *AJIL*, p 354-5 [Hereinafter *ICL Reports*]

¹⁷ The *ILC* described these rules as “principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc.” Ibid, 350

B.1 The “intentions” School

For the ‘intentions’ school, the prime object is to ascertain and give effect to the intentions of the parties: the approach is therefore to discover what these were, or must be taken to have been. The view that to ascertain and give effect to them is the prime and sole legitimate object of interpretation is derived from well-known principles of private contract law.¹⁸ As this school places the main emphasis on the intentions of the parties, in consequence, it admits a liberal recourse to the *travaux préparatoires* and to other evidence of the intentions of the contracting States as means of interpretation.¹⁹

It is widely accepted that the main goal of interpretation is to carry out the intention of the parties. With the exception of the extreme teleological approach, which places more emphasis on the objects and purposes of the text rather than the intention of the parties, no one seriously rejects such an aim.²⁰ Certainly, no one would assert the contrary view, that it would be appropriate for interpretation to produce a result outside the intention of the founders of the text. Consequently, the “intentions” method of interpretation may be thought to have the most direct appeal; it is natural to ask “What did the parties intend by this clause?”²¹ There are, however, a number of difficulties with this approach in the context of Security Council resolutions, as follows:

(I) The nature of the Council and the rotation system of its members make it difficult, if not impossible, to ascertain the intention of the members as it existed at the time of the adoption of the resolution in question. Apart from the permanent members, many of those States which

¹⁸ Fitzmaurice, note 13 *supra*, p 3 Professor Lauterpacht, for example, stated that “it is the intention of the authors....which is the starting-point and the goal of all interpretation. It is the duty of the judge to resort to all available means...to discover the intention of the parties...Words have absolutely no meaning in themselves. They are an expression of will” Lauterpacht, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties”, *BYIL*, 1949, p 83

¹⁹ Lauterpacht, *ibid*, p51

²⁰ Fitzmaurice, G. “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points”, 33 *BYIL*, 1957, p 204

²¹ *Ibid*

played a part in the framing of the resolution may no longer be members of the Council in the implementation stage or at the time of interpretation, while on the other hand other States which took no share in the framing do become members by subsequent accession. Those more recent members may participate in debate over a particular resolution long after it was originally formulated, by which time, even if the exact intentions of the framers can be identified, they will have been overlaid by the practice and application of the intervening years. This may be the case on many occasions in which the majority of the present members of the Council—it might be in some cases up to all 10 non-permanent members of the Council—are States which had no hand in the original drafting of the resolution. An example can be derived from the Gulf case. In 1990, when the Council adopted Resolution 678, the ten non-permanent Council members were: Canada, Colombia, Cote D'Ivoire, Cuba, Ethiopia, Finland, Malaysia, Romania, Yemen and Zaire. In 2003, in debating the invasion of Iraq, the ten non-permanent Council members were: Angola, Bulgaria, Cameroon, Chile, Germany, Guinea, Mexico, Pakistan, Spain and Syrian Arab Republic. Thus, none of the ten non-permanent members had a share in drafting the original resolution authorizing the use of force against Iraq. Therefore, the only intentions which can be ascertained are those of the five permanent members.

(II) The aim of carrying out the intentions of the parties can refer only to their joint or common intentions. Professor Lauterpacht, an advocate for the 'intentions school,' insists that this common intention of the parties is "necessarily implied" can be discovered in light of the purposes and objects underling the treaty as a whole.²² Fitzmaurice, on the other hand, asserts that in the context of multilateral conventions this common intention might be impossible to discover.²³ This latter view seems more compatible with regard to Security Council resolutions. The formulation of Security Council resolutions often reflects the varied aims, motives, interests,

²² Lauterpacht, note 18 *supra*, p 81

²³ Fitzmaurice, 1957, note 20 *supra*, p 205-6

and ideologies of whichever States were represented in the Council at the time. When interpretation is subsequently debated, the parties will not only be placing different interpretations on the text, but they will actually be claiming different intentions in regard to it. In other words, they will be claiming to have had different intentions from the beginning, since obviously a resolution cannot be interpreted based on a subsequent change of attitude or intention by one or more of the parties only. The effect is that, when there are disputes on interpretation and different claims as to intention, it is not possible to identify anything which is agreed by all the members concerned to have been their common intention. In such a situation, it would clearly not be acceptable, from a legal perspective, to favour the alleged intentions of one or more parties, based on what can only be a value judgment about the relative desirability of each set of professed intentions. Such a finding can have no legitimacy. Resolution 687 is a case in point. The negotiations of that resolution show deep differences of opinion about the intentions and the ultimate purpose of the resolution. It is nearly impossible to discover a common intention of the member States in that resolution. It is difficult even to find a general consent among all members over the provisions of that resolution.

(III) As a political reality, States are not always clear in expressing their intentions and motives and the declared intention may cover a hidden one. In other cases, some members, as is obvious in the official records of the Security Council, had no intentions at all on the point. Furthermore, the unbalanced nature of the constitution of the Council gives the permanent members influence over the other members; indeed, sometimes Permanent Members may exert political and diplomatic pressure over other members to secure their votes.²⁴

²⁴ For an example on the point see Chapter 3, note 25

In the light of these issues, the idea of parties' intentions is a rather tenuous concept, at it is virtually impossible to identify and give effect to them. As a corollary, this leads to doubts of the significance of the *travaux préparatoires* of the resolutions.

B.2 The textual school

In the view of the "textual" school, the basic aim is to ascertain what the text means according to the ordinary or apparent sense of its terms: the approach is therefore one of detailed textual analysis.²⁵ The approach is more scientific than the previous one. The textual school does not ignore the question of intentions, but it places its main focus elsewhere, or, it could be said, aims to give effect to intentions by a less direct method than investigation of them *per se*. Whereas the 'intentions' approach tries to decide the meaning of the text in the light of intentions of the parties, the textual school takes the converse approach of deducing the intentions of the parties in the light of the meaning of the text they drew up. If this were not so, logically, after a quick and superficial reading of the text, the starting point of interpretation would be an independent investigation, *ab extra*, of the parties' intentions, not until these had been settled would detailed consideration of the text take place and its meaning and effect be decided. However, this is not how the process is carried out.²⁶ Interpretation inevitably starts with in-depth analysis of the text to be interpreted, because it is in and through the text that the will and intentions of the parties is expressed. To clarify its meaning, therefore, is, it is assumed, to give effect to that will and intention. Nevertheless, although the finding can in this sense be linked to the question of intentions, each case actually proceeds on an independent basis; the interpretation could be arrived at without any explicit investigation of or pronouncement on intentions.²⁷

²⁵ Fitzmaurice, 1951, note 13 *supra*, p 1-2

²⁶ Fitzmaurice, 1957, note 20 *supra*, p 206-7

²⁷ Ibid

However, where there are ambiguities, omissions or obscurities in the text, recourse to other means of interpretation may be justified and even necessary. Even if it is necessary to resort to extraneous sources of interpretation, however, the object is still the same—to decide what the text means or must be assumed to mean. Thus, the purpose in employing extraneous means of interpretation is not to discover specifically what the parties intended as such, but to discover what the resulting text must be taken to mean, or (on a teleological basis) what the objects and purposes of the treaty apparently were.²⁸ The majority of writers emphasize the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation.²⁹

With respect to the Security Council Resolutions, the fact is that any resolution was drafted, following a process of negotiation in which all legal and political considerations were taken into account, specifically to express the intentions of the members, and it must be assumed that they do so. This intention is, therefore, on the face of it, contained in the text of the resolution itself, and so the key issue is not what the Council Members intended by the text, but what the text itself means. Whatever meaning is derived from an ordinary and natural construction of its terms, will be assumed to be what the Members intended. There is therefore no need or justification for looking beyond the ordinary meaning, unless the text contains manifest ambiguities, obscurities, or lacunae. However, the existence of a dispute about the meaning does not in itself mean that there is any obscurity or ambiguity, as evidenced by numerous instances where international

²⁸ Ibid

²⁹ *ILC Reports*, note 16 *supra*, p 350

tribunals have found the face meaning of disputed texts to be perfectly clear.³⁰ The dispute about the interpretation of Resolution 678 seems to be a case in point, as will be discussed below.

Textual interpretation, according to Article 31 of Vienna Convention, should follow the following principles;

B.2.1 The Principle of "Good Faith"

The first principle, *bona fides*, meaning that the document must be interpreted in good faith, is a direct consequence of the *pacta sunt servanda* rule.³¹ It is not confined to interpretation, but is a general principle of law.³² The implication of this rule for interpretation is that it must not be arbitrary and must not deviate from the 'true' substantive meaning.³³

B.2.2 The principle of the natural and ordinary meaning

The textual approach proposes that an agreement is to be interpreted primarily as it stands, and on the basis of their actual text. Adherence to the "natural and ordinary meaning" is the basic principle of the textual approach: it is assumed that what appears from the ordinary meaning of the terms used is what the parties intended.³⁴ Particular expressions should be given their normal, natural, and unstrained meaning in the context in which they occur.³⁵ Any departure from the natural and ordinary meaning is permissible only if there is clear evidence that the terms used are

³⁰ For example, in the (First) *Admissions* case, the Court stated that "The Court considers that the text is sufficiently clear." ICJ Reports, 1948, p 63; in the (Second) *Admissions* case, the Court held that "In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them." ICJ Reports, 1950, p 8,

³¹ *ILC Reports*, note 16 *supra*, p 355

³² In the *Nuclear Tests* case (Australia v. France), for example, the ICJ stated that "One of the basic principles governing and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation." ICJ Reports, 1974, p 268, para. 46

³³ Simma, note 11 *supra*, p 19

³⁴ *ILC Reports*, note 16 *supra*, p 355

³⁵ The ICJ, in its *Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations*, said: "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur." ICJ Reports, 1950, p 8

meant to be accorded a meaning other than the natural and ordinary one, or if the consequence of the ordinary interpretation would be unreasonable or absurd in the context.³⁶

B.2.3 The principle of integration (Systematic Interpretation)

Common sense and good faith dictate that the ordinary meaning of a term cannot be decided in the abstract but must be viewed in the context of the treaty and taking into account its object and purpose.³⁷ The Court had on a number of occasions reiterated this principle.³⁸ This principle has been formulated in Article 31(2) of the Vienna Convention.³⁹ Accordingly, in the case of a Security Council resolution, the context of such a resolution covers not only the position of a word or group of words within a sentence but goes beyond that and also encompasses the text of the resolution as a whole. All elements comprised in a given resolution, including all its parts such as the preamble and annexes, should be considered since they form a part of or are intimately related to the resolution. Most importantly, it is suggested that a resolution should be read in connection with other resolutions regarding the same case. For example, for a better understanding for resolution 678, all prior and subsequent resolutions adopted regarding the same case should be taken into account. This suggestion is consistent with the Security Council practice to mention all related resolutions regarding the case in the preamble of such resolution. This suggestion can also find grounds in Article 31(3) (a) which stated that it “shall be taken into

³⁶ Fitzmaurice, 1957, note 20 *supra*, p 211

³⁷ *ILC Reports*, note 16 *supra*, p 355

³⁸ The Permanent Court, for example, in an early Advisory Opinion stressed that “in considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.” *Advisory Opinion of the Competence of the I.L.O to Regulate Agriculture Labour*, PCIJ Reports, 1922, Series B, No. 2, p 23

³⁹ Article 31(2) of the Vienna Convention states that “the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”⁴⁰

B.3 The teleological school

The application of the teleological approach is almost entirely in the field of general multilateral conventions, particularly those formulated for social, humanitarian, and law-making purposes.⁴¹

This approach implies that interpretation of a text should take into account what is declared, known, or presumed about its objects, principles and purposes. As long as these are upheld, lacunae can be filled, corrections made, or texts expanded or supplemented.⁴² Thus, the starting point is to determine the general purpose of the text based on, for example, its overall sense and tone, the circumstances of its formulation and its function in international relations; and to interpret individual expressions accordingly.⁴³ As a result, there is, with the teleological approach, especially in the case of multilateral agreements, a greater possibility of interpretations being accepted which go beyond, or even diverge from, the original intentions of the parties as expressed in the text. However, because of this possible departure from the intentions of the founders of the resolution or extending the meaning of text illegitimately to cover matters were not originally intended by the parties at the time of adoption, therefore, teleological interpretation has been considered as a secondary approach. This proposition was held by the International Law Commission. As indicated previously, however, Article 31 of Vienna Convention did not completely ignore the objects and purposes of the text.⁴⁴ It stated that “A treaty shall be interpreted in ...the light of its object and purpose.” In a negative way, the text cannot be

⁴⁰ Article 31(3) (a) of the Vienna Convention

⁴¹ Fitzmaurice, 1951, note 13 *supra*, p 2

⁴² *Ibid*, p 8

⁴³ *Ibid*, p 2

⁴⁴ In drafting Article 31, the Commission took the view that for the purpose of formulating the general rules of interpretation; the principle expressed in the maxim *ut res magis valeat quam pereat* should not be considered as one of those rules, although that does not preclude recourse to the principle where the circumstances warrant it, and the Commission accepted that it has always been recognized in international rulings. *ILC Reports*, note 16 *supra*, p 351

interpreted to give effect to a meaning not within the declared framework of the objects and purposes of the text.

The same applies to Security Council resolutions. Such weight is attached, for interpretation, to the purpose of the resolution, that it reduces the will of the Member States of the Council at the time of the adoption to a secondary role. Interpretation depends on the scope of the resolution's objectives, with a distinction being made between resolutions of universal and binding character differs and those with more limited scope or which are not binding on member States. However, although teleological interpretation comes as a subordinate approach after the textual approach, it might play an important role in interpreting Security Council resolutions, especially; those authorize the use of force. For example, taking account of the political considerations, for resolutions that authorize States to use forceful measures against an aggressor, it might be necessary to utilize the principles of effectiveness and implied power in interpreting them.

Two essential rules pertain to the objects and purposes of the text (the teleological approach), as follows;

B.3.1 The "Effectiveness" rule

This rule means that texts are to be interpreted in the light of their expressed or evident objects and purposes; and individual provisions are to be given the maximum effectiveness consistent with the normal meaning of the words and with other parts of the text, and interpreted in a manner whereby a reason and a meaning can be attributed to every part of the text.⁴⁵ Thus, if there is more than one possible interpretation of a text, preference should be given to that which best serves the recognizable purpose of the resolution and its various provisions.⁴⁶ When applied

⁴⁵ Fitzmaurice, 1957, note 20 *supra*, p 211

⁴⁶ Simma, note 11 *supra*, p 31

correctly, this principle does not warrant an “extensive” or “liberal” interpretation that goes beyond the declared or clearly implied purpose manifested in the terms of the treaty.⁴⁷

B.3.2 The rule of implied power

When the text to be interpreted is a statute of an international organization, particularly the UN Charter, an important consideration in the teleological approach is the determination of implied powers. The assumption is that an organization must be granted the powers necessary for the performance and execution of its functions and responsibilities,⁴⁸ a view which was expressed by the ICJ.⁴⁹

This rationale, which led the Court to apply this principle to charters of international organizations to carry out its responsibilities and duties, should also, by analogy, result in the applicability of this principle to some Security Council resolution, where the Council assigns to its members—all or some of them—the power to execute missions on its behalf. This is especially the case, when the Council authorizes Member States to use force against an aggressor State. In the absence of the Council’s own standing forces, it should be assumed that the Council assigned some of its powers to Member States; this is one of the basic principles of the law of contract.⁵⁰ This assumption is consistent with the political reality. Reaching a decision in the Council is not an easy matter; it involves a prolonged process of negotiations, taking account of all related political and legal considerations and compromises, in order to avoid the use or threat of veto power. As a result, referring back to the Council in every step in the implementation stage of such a resolution is not practical and may slow down or even impede the execution of

⁴⁷ *ILC Reports*, note 16 *supra*, p 351

⁴⁸ Simma, note 11 *supra*, p 31

⁴⁹ In the *Reparations* Case the ICJ stated that “under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary application as being essential to the performance of its duties. This [is a] principle of law.” *Reparations* case, ICJ Reports, 1949 p 182. Similar view has been expressed by the ICJ in the *Effect of Awards* case, ICJ Reports, 1954, p 56

⁵⁰ See Chapter 3, section C

the resolution. However, this is not to suggest that the Council loses control over the matter after the adoption of the decision; the Council simply can terminate its authorization or assignment in an explicit way after achieving the goals intended by the resolution. Nevertheless, owing to the risk of malpractice of this principle, it should be categorized as a secondary mean of interpretation.

B.4 Supplementary means of interpretation

The general principle is that cognitive elements outside the text, such as the preparatory works and subsequent practice, should not be resorted to for interpretation purposes, if a clear result can be derived from the text itself. The International Court in practice has taken the approach that the text of an international treaty should be interpreted on its own terms, and that the wording itself should be of decisive significance.⁵¹ The ICJ dismissed any recourse to supplementary means if the wording is clear.⁵²

B.4.1 Recourse to travaux préparatoires

As to the resort to the *travaux préparatoires*, Article 32 of the Convention stated that recourse to further means of interpretation, including preparatory work, is permissible for the purpose of confirming “the meaning resulting from the application of Article 31” and for the purpose of “determining the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” In harmony with this principle, International Tribunals have on occasions referred to the preparatory work for the purpose of confirming their conclusions as to the

⁵¹ In the *IMCO* case the ICJ stated that “The words of Article 28(a) must be read in their natural and ordinary meaning, in the sense which they would normally have in their context. It is only if, when this is done, the words of the Article are ambiguous in any way that resort needs to be had to other methods of construction.” ICJ Reports, 1960, p 159

⁵² In its *Advisory Opinion on the Competence of the General Assembly*, the ICJ stated “if the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.” ICJ Reports, 1950, p 8

“ordinary” meaning of the text where the language is unambiguous,⁵³ although often this is considered unnecessary.⁵⁴

Regarding the “absurd or unreasonable” result, the Court has recognized this exception to the rule that terms must be interpreted according to their ordinary meaning. However, it has comparatively rarely had recourse to other sources for such a reason, suggesting that the absurdity or unreasonableness of the “ordinary” meaning must be manifest, for non-textual sources to be considered.⁵⁵ According to the International Law Commission, such strict limitation is necessary to prevent the authority of the ordinary meaning of the terms being unduly weakened.⁵⁶

As to the Security Council resolutions, there are difficulties attached to recourse to the preparatory works in case of ambiguity in the wording of the text, due to the frequently incompleteness or misleading nature of the records of negotiations and preparatory work, which necessitate considerable caution in employing them for the purpose of aiding interpretation.⁵⁷

Resolution 687 is a case in point. The negotiations took place in a context of deep differences of opinion about the intentions and the ultimate purpose of the resolution, which related to almost every part of the resolution, as to the border, the weapons-related obligations and compensation.⁵⁸ Additionally, although the resolution made no explicit reference to the removal of Saddam Hussein from power, representatives of the UK and US suggested that his removal

⁵³ The Permanent Court made such a confirmatory reference in its opinion on the *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* saying: “The preparatory work thus confirms the conclusion reached on a study of the text of the Convention that there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words.” PCIJ, 1932, Series A/B, No. 50, p. 380

⁵⁴ For example, in its *Advisory Opinion on Admission of a State to the United Nations*: “The Court considers that the text is sufficiently clear; consequently it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.” ICJ Reports, 1948, p. 63

⁵⁵ Simma, note 11 *supra*, p 26; ILC Reports, note 16 *supra*, p 360

⁵⁶ ILC Reports, *ibid*

⁵⁷ *Ibid*, p 354

⁵⁸ Johnstone, I. *Aftermath of the Gulf War: An Assessment of UN Action*, International Peace Academy, Lynne Rienner Publishers, London, 1994, p 17-18

was a prerequisite for the restoration of peace and security. Sir David Hannay of the United Kingdom, in explaining the vote of his country, stated, “My government believes that it will in fact prove impossible for Iraq to rejoin the community of civilized nations while Saddam Hussein remains in power.”⁵⁹ This view was not shared by other member States.⁶⁰ Consequently, it seems that in the case of Security Council resolution, resorting to the *travaux préparatoires* or investigating the intentions of the parties, in general, would result in a misleading and distorted vision and, indeed, to do so might only lead to the possible exclusion of relevant evidence. As a political reality, it will rarely be possible to find consistent declarations of States’ representatives if many States involved in the preparatory work. Therefore, recourse to the *travaux préparatoires* may be useful only to confirm the interpretation derived by means of the textual or teleological methods of interpretation, depending on the given resolution.

B.4.2 Recourse to the subsequent practice

Article 31(3)(b) of the Vienna Convention stated that for the purpose of interpretation “any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation” should be taken into account together with the context. According to this paragraph, reference may be made to the subsequent conduct and practice of the parties in relation to the treaty, the advantage being that such practice offers evidence of how the treaty has been interpreted in practice, and, hence, what meaning should be imputed to it.⁶¹ Recourse to subsequent practice as a means of interpretation is well established in the jurisprudence of international tribunals.⁶²

⁵⁹ *UN Doc. S/PV. 2981*, p 116

⁶⁰ See generally *UN Doc. S/PV. 2981*

⁶¹ Fitzmaurice, 1957, note 20 *supra*, p 211

⁶² In its opinion on the *Competence of the ILO to Regulate Agricultural Labor*, the Permanent Court said: “If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty.” *Advisory Opinion of the Competence of the I.L.O to Regulate Agriculture Labour*, PCIJ Reports, 1922, Series B, No. 2, p. 39. The ICJ referred to subsequent practice in confirmation of the meaning which it had deduced from the text and which it considered to be unambiguous.

In the context of Security Council resolutions, it is suggested that this principle may be applicable to two kinds of practice; first, the preceding and subsequent practice of the Security Council, as an international body, in similar cases, which constitutes a normative element of interpretation; second, the subsequent practice of the members of the Council in implementing a given resolution. It should be noted, however, that State practice does not necessarily reflect agreement among all member States.⁶³

B.5 Summary of the rules applicable for Security Council Resolution

In the light of the foregoing analysis of the theories and principles of the rules of interpretation, the following may be offered as guidelines for interpreting Security Council resolutions;

(A) The text of a given resolution must be, first and foremost, interpreted as it stands and to give effect to intention of the drafters at the time of conclusion. This textual approach must be carried out in good faith, regardless any political factor, and according to the following principles:

(I) The natural and ordinary meaning of the words of the text, taking account of the purposes and objects of the resolution.

(II) All elements comprised in a given resolution, including all its parts such as the preamble and annexes, should be considered since they form a part of or are intimately related to the resolution. In addition, a resolution should also be read in connection with other resolutions regarding the same case. Interpreting a resolution in isolation may give a distorted vision for the intentions of the drafters.

(B) Once the meaning of the text has been established according to the foregoing principles, its individual provisions are to be given the maximum effectiveness consistent with that meaning. Preference should be given to that interpretation which best serves the recognizable purpose of

In the *Corfu Channel* case, the ICJ said: "The subsequent attitude of the Parties shows it has not been their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation." ICJ Reports, 1949, p. 25

⁶³ Simma, note 11 *supra*, p 28

the resolution and its various provisions. In some cases, especially where the resolution assigns to some or all Council Members the power to execute missions on its behalf, it might be necessary to attach more weight to the purpose of the resolution and to utilize the principle of implied power in interpreting these resolutions. However, reliance on purposes of the resolution in the interpretation or resorting to the principle of implied power, which usually emerge out of political necessity, does not mean going beyond, or diverging from, the original intentions of the Council Members as expressed in the text or extending the meaning of text to cover matters not originally intended by the parties. Thus, a balance has to be struck between the need to overcome the political difficulties and maintaining the meaning of the text according to the textual interpretation.

(C) Recourse to cognitive elements outside the text of the resolution (including all its parts and the other related resolutions) is only permissible to clarify the meaning if there is an ambiguity in the wording of the text or to confirm the meaning reached by the textual interpretation. However, differentiations have to be made in this respect.

(I) Resorting to the *travaux préparatoires* of the resolution may be useful only to confirm the interpretation derived by means of the textual or teleological methods of interpretation, depending on the given resolution. However, in case of ambiguity of the wording of the text, it is suggested that the preparatory works should be avoided in this regard, owing to the fact that it might result in a misleading and distorted vision and the possible exclusion of relevant evidence.

(II) As to the subsequent practice, reference may be made to the subsequent conduct and practice of the parties in relation to the given resolution for both purposes (clarifying an ambiguity in the text and confirming the meaning.) However, two kinds of practice must be distinguished; first, the preceding and subsequent practice of the Security

Council, as an international body, in similar cases, which constitutes a normative element of interpretation; second, the subsequent practice of the members of the Council in implementing a given resolution.

Section C: Interpreting Resolution 678 in light of Resolution 687 and other relevant resolutions

Before dwelling on interpreting Resolution 678 according to the guidelines concluded in the preceding section, attention must be drawn to a theory of interpretation suggests that Security Council resolutions that authorize the use of force should be interpreted restrictively. This theory has been emerged particularly regarding Resolution 678; therefore, it has to be examined first.

C.1. The theory of restrictive interpretation for Resolution 678 in light of the principles of the UN Charter

The Gulf War mandate of Resolution 678 authorized member states “to use all necessary means” not only “to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions” but also “to restore international peace and security in the area.” Among the “subsequent relevant resolutions”, the cease-fire Resolution 687 was particularly important. Resolution 678 has been cited to support the authority of the United States and the United Kingdom, both to enforce Resolution 687’s obligations and to restore “international peace and security” to the region.⁶⁴ An ongoing threat to such peace and security was said to be presented by Iraq’s material breach of its disarmament obligations under Resolution 687.⁶⁵ As a result, the authorization of the use of force under Resolution 678, which had been in abeyance but remained valid, was triggered. From this perspective, the end of the cease-fire and resumption of hostilities

⁶⁴ Yoo, note 6 *supra*, p 567; Taft, W and Buchwald, T. “Preemption, Iraq, and International Law”; 97 *AJIL*, 2003, p 559; Wedgwood, R. “The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence”, 97 *AJIL*, 2003, p 578-9

⁶⁵ *President Bush’ Remarks at the UNGA*, note 1 *supra*

with Iraq was justified to counter Iraq's continuing threat of international peace and security.⁶⁶ Thus, the uses of military force against Iraq after the establishment of the formal cease-fire on many occasions and eventually in 2003 were lawful and necessary to obtain Iraqi compliance with the terms of the cease-fire in order to restore international peace and security to the region. This understanding of Resolution 678 has been disputed. It has been argued that this argument is both incorrect and unjustified by the terms of the text of Resolution 678, where, it is claimed, the clear intent of the Security Council was to authorize the removal of Iraqi forces from Kuwait. It did not mean that any member State should have carte blanche to attack Iraq to enforce inspections mandated after the war.⁶⁷ Consequently, an armed response to breaches of the cease-fire agreement would not be made by individual states; a new Security Council authorization was needed. This view that the mandate of Resolution 678 was terminated by the ousting of Iraq from Kuwaiti soil seemed to be held by the representatives of China, France, and Russia in the Security Council. They appeared to consider that the refusal of the current members of the Security Council to agree to the use of force in the Spring of 2003 nullified the 1991 resolution's broad authorization.⁶⁸

This proposition has been grounded on two arguments. First, resolutions that authorize the use of force should be interpreted restrictively in light of the Charter Principle of minimizing the use of force in international relations.⁶⁹ Second, the phrase "and to restore international peace and security in the area" should be read in the context of the liberation Kuwait.⁷⁰ In other words, international peace and security in the region is to be restored by returning to the *status quo* prior to the Iraqi invasion of Kuwait. The first part of this section addresses the first argument in order

⁶⁶ Yoo, note 6 *supra*, p 567

⁶⁷ See, for example, Ratner, M. "Bypassing the Security Council: Ambiguous Authorization to Use Force, Cease-Fires and the Iraqi Inspection Regime", 93 *AJIL*, 1999, p 140

⁶⁸ See Statements by the Representatives of China, France and Russian Federation after the adoption of Resolution 1441 in Security Council 4644th meeting of 8 November, 2002. Press Release, *UN Doc. SC/7564*

⁶⁹ Ratner, note 67 *supra*, p 128

⁷⁰ *Ibid*, p 140-1

to explore whether the general principle of the UN Charter of prohibiting the use of force in international relations implies that Resolution 678 should be interpreted restrictively. The second argument will be examined in the ensuing parts in the course of the interpretation of this resolution.

Professor Ranter emphasized that the general and substantive principle in the United Nations Charter is that international disputes are to be resolved by peaceful means. Arising from that principle, he argued: (1) that explicit authorization of force must be interpreted narrowly in order to minimize violence in the international community and to reduce the scope for states to take advantage of such authorization to pursue national objectives that go beyond the Council's clear intention; (2) that authorizations are valid only until the goals of the operation are met and a permanent cease-fire is established.⁷¹ Application of these rules to the present case suggests that the authorization of use of force in Resolution 678 lasts only as long as necessary to meet the goals of the operation and establish a permanent cease-fire unless the Council explicitly indicates otherwise. By implication, the authorization of Resolution 678 was terminated by the ousting of Iraqi troops from Kuwaiti territories and when the permanent cease-fire resolutions 686 and 687 were negotiated. This view is directly linked to the preference, expressed in the Charter, for peaceful means of dispute resolution, and the Article 2(4) prohibition on the use force other than in self-defence.⁷² In addition, the Council's mandate for military action against Iraq in 1990 should be seen in the context of the broad aim of the United Nations, of minimizing violence in the international community. Therefore, the Security Council, by authoring the use of force in Resolution 678, should not be presumed to have intended the maximum use of force that might

⁷¹ Ibid, p 128. These remarks was made in the context of incident of 1998, when the US and the UK asserted that they had the authority under Resolution 678 to use of force to compel Iraqi compliance with the UN inspection obligations under Resolution 687, not in the context of the invasion of 2003. However, these remarks are applicable for the later situation.

⁷² Ibid, p 129

be inferred from a broad authorization.⁷³ Moreover, force should be used to the benefit of the international community, not individual states. Too broad an interpretation of the authorization of force would allow powerful states to act in their own self-interest, under the cloak of UN authorization, possibly to the detriment of the international community as a whole.⁷⁴ Finally, the fundamental values of the Charter require that the Security Council retain strict control over the initiation, duration and objectives of the use of force in international relations.⁷⁵ Therefore, he concluded that the Charter principles suggest that the less extensive view of Resolution 678 should be presumed to prevail, unless there is clear evidence of a different intention.

This view, however, is not consistent with the rules of interpretation. The issue of extensiveness or restrictiveness does not refer to the rules of interpretation *per se*. The interpretation is based on the text of the resolution. One or other type of interpretation may be preferred in a given case, according to whether it produced a restrictive or extensive result, but the terms extensive and restrictive do not connote distinctive methods as such that could be applied to the resolution.⁷⁶ As to Resolution 678, in fact, the Security Council has never readily authorized the use of force, neither in the present case nor in any preceding or subsequent case.⁷⁷ The Council resorts to forcible measures after peaceful means and non-forcible measures have been totally exhausted. This is evidenced by the fact that the Council has adopted 11 resolutions demanding non-forcible end for the crisis before authorizing the use of force.⁷⁸ However, according to the rule of “effectiveness”, when the Council authorizes the use of military force as the sole and last

⁷³ Ibid

⁷⁴ Ibid, p 127

⁷⁵ Ibid

⁷⁶ Simma, note 11 *supra*, p 32

⁷⁷ Yoo, note 6 *supra*, p 567

⁷⁸ These resolutions are; Resolution 660 of 2 August 1990, Resolution 661 of 6 August 1990, Resolution 662 of 9 August 1990, Resolution 664 of 18 August 1990, Resolution 665 of 25 August 1990, Resolution 666 of 13 September 1990, Resolution 667 of 17 September 1990, Resolution 669 of 24 September 1990, Resolution 670 of 25 September 1990, Resolution 674 of 29 October 1990 and Resolution 677 of 28 November 1990

resort, its authorization should be interpreted in its fullest weight and to give the utmost effect to the purpose of the text, otherwise, the Council decisions may be flouted and fail as the other means have failed.

In practice, confining the interpretation of a resolution by the general principles or provisions of the United Nations Charter could be confusing and may lead to misunderstanding of the true meaning of the text and the intentions of the drafters. Political and diplomatic considerations may require that the text of a resolution to be formulated in a way that does not contain specific terms such as the word “force”. For example, in the negotiation history of Resolution 678 of 1990 the United States apparently wanted an explicit reference to the use of military force against Iraq, but owing to Soviet objections the Council substituted the expression “all necessary means.”⁷⁹ Nevertheless, it was clearly understood that the Council’s intent was to authorize the use of force.⁸⁰ Similarly, the word “force” was not used in the cases of Korea,⁸¹ Somalia,⁸² Rwanda,⁸³ or Haiti.⁸⁴ However, there was also a general consent that this language means that the Council has authorized the use of military force. If the principles of prohibiting the use of force and peaceful settlement of disputes are to be taken as general and rigid limitations, neither resolution could be interpreted to mean the use of force; which is clearly incorrect and against what was intended by the drafters. From a different point of view, the constructions of these

⁷⁹ Woodward, B. *The Commanders*, Simon & Schuster, New York, 1991, p 334

⁸⁰ See generally *UN Doc. S/PV. 2963*. Council members clearly understood “all necessary means” to include military action, Security Council 2963rd meetings, SCOR 1990. Mr. Qian Qichen the Representative of China, stated that “all necessary means . . . in essence, permits the use of military action”), *ibid* p 62; Mr. Clark the Representative of Canada, stated that the “means” in the Iraq resolution “include the use of force”, *ibid* at 71; Mr. Hurd, the Representative of the U.K, referring to the resolution as “the military option”, *ibid* p 81-82; Mr. Baker the Representative of the U.S., stated that the “[Iraq] resolution is very clear. The words authorize the use of force” *ibid*, p 103. Only the Representative of Malaysia understood that further approval was needed before military action been taken. Mr. Abu Hassan, the Representative of Malaysia, stated that “any proposed use of force must be brought before the Council for its approval.” *Ibid*, at 76

⁸¹ In Resolution 83 of 27 June 1950, the Council used the phrase “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack.”

⁸² Security Council Resolution 794 of 3 December, 1992; see Chapter 3, note 75

⁸³ Security Council Resolution 929 of 22 June, 1994; see Chapter 3, note 76

⁸⁴ Security Council Resolution 940 of 31 July, 1994; see Chapter 8, note 155

resolutions, in fact, leave the decision as to what measures, e.g. military force, or some lesser measure short is needed, to the discretion of member States. This being so, if they decide to use military force, they would be doing so with Security Council approval.⁸⁵ Again, if the restrictive method of interpretation is to be applied, actions taken in those situations could be seen as a violation of the principles of the UN Charter because the peaceful means were not exhausted by the acting members first.

Therefore, in conclusion, it seems more appropriate to interpret such a resolution as it stands and to give effect to intention of the drafters rather than take as prerequisite a restrictive view of interpretation and compulsory reference to the Charter principles. As for the obligation of peaceful settlement of disputes, as long as the Council has authorized the use of force, its decision undoubtedly implies that peaceful means and non-forcible measures have already been exhausted.

C.2. Textual interpretation for Resolution 678

Having reviewed the arguments and theories for interpretation of Security Council resolutions and reached the conclusion that Resolution 678 should be interpreted as it stands without applying prerequisite restrictive view, the following parts of this section embark on textual interpretation of that resolution in light of its purposes and objectives in order to find out: what the Council actually intended by the language of Resolution 678; merely to oust Iraq out of Kuwait or did it have other broader intentions behind the text? And did the Council intend by the permanent cease-fire established in Resolution 687 to terminate its prior authorization of force?

C.2.1 The natural and ordinary meaning of words

Resolution 678, after extensive negotiations taking account of all legal and political considerations, was drafted precisely in order to give expression to the intentions of the

⁸⁵ Quigley, J. "The 'Privatization' of the Security Council Enforcement Action: A Threat to Multilateralism", 17 *Michigan Journal of International Law*, 1996, p 262

members, and must be presumed to do so. From a purely textual approach and according to the principles of good faith and the ordinary meaning of the words, the language “Authorizes Member States...to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area” should be interpreted to say that the Council’s intention was not only to drive Iraq out of Kuwait but also to leave room for other actions that might reasonably be related to ensuring continued peace and security and eliminating aggression in the region. The use of the term “and” is a clear textual evidence of this specific intent. Moreover, it could be argued that the textual approach—and according to the principles of good faith and ordinary meaning of words—yields an extensive view of the text. Although the text seems clear on its face, Professor Ratner disputed this meaning, albeit without giving any other interpretation. He suggested that the phrase “and to restore international peace and security in the area” in Resolution 678 and similarly in Resolution 83(1950) in the case of Korea was “unnecessary,” “essentially boilerplate” and “added no clear meaning or objectives to either the 1950 Korean War or the 1990 Persian Gulf War authorization.”⁸⁶ In both cases, he argues, the legitimate objectives of the forcible action could be expressed and served without “such open-ended language.”⁸⁷ He attributed this “problematic expression” to the “poor drafting or insufficient attention to linguistic precision.”⁸⁸

What this argument seems to suggest is that this phrase should be omitted in the interpretation process. However, there is no rule or theory of interpretation whatsoever that permits the omission of a word or a phrase from the document. At any rate, it is irrational and against the principles of good faith and the ordinary meaning to suggest that the Security Council intended nothing by inserting this phrase. This proposition finds support in the ICJ judgment in the *Corfu*

⁸⁶ Ratner, note 67 *supra*, p 140-1

⁸⁷ Ibid, p 141

⁸⁸ Ibid, p 140 at footnotes

Channel case. The Court in interpreting a Special Agreement said: “It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision ... should be devoid of purport or effect.”⁸⁹ Furthermore, as stated in Article 31(4), “a special meaning shall be given to a term if it is established that the parties so intended.” Thus, the natural and ordinary meaning can only be displaced by direct evidence that the terms used are to be understood in another sense than the natural and ordinary one. No such direct evidence has been submitted to suggest the negation of that phrase.

The natural and ordinary meaning of Resolution 678 was rejected on the ground that it appears to be virtually limitless. “Restoring international peace and security”, in the absence of any more specific definition, could justify occupying Iraq, toppling Saddam Hussein’s regime, or bombing Iraq’s military capacity.⁹⁰ In fact, the phrase “to restore international peace and security” cannot be defined on legal basis; its only definition is of political nature.⁹¹ To put it simply, how it can be determined that international peace and security has been restored in legal terms? Indeed, this determination can only be made on a political basis. But, the Council is a political organization, which formulates its resolutions from a political rather than a legal perspective. Therefore, if the interpretation chosen by the Council—albeit perhaps for political reasons, is legally and logically possible, it is perfectly entitled to make such a choice.⁹² Thus, the difficulty of defining “restoring international peace and security” on a legal basis, does not preclude such an interpretation on political and logical grounds. Such ambiguity can be clarified by taking account

⁸⁹ *Corfu Channel* case, ICJ Reports, 1949, p 24

⁹⁰ Ratner, note 67 *supra*, p 139-40; see also Rostow, E. “Until What? Enforcement Action or Collective Self-Defence?”, 85 *AJIL*, p 516; A similar view was expressed by the Representative of Malaysia in the Security Council during the drafting of Resolution 678. He argued that the Resolution “does not provide a blank cheque for excessive and indiscriminate use of force.” *UN Doc. S/PV. 2963*. p 76-77

⁹¹ As mentioned in Chapter 1, Professor Henkin has observed that the term “threat to international peace and security” in the UN Charter “is not capable of legal definition, but only of political determination by a political body.” Henkin, L. “Conceptualizing Violence: Present and Future Developments in International Law”, 60 *Alabama Law Review*, 1997, p 575; see also Chapter 1, section C.1.1

⁹² Kunz, note 9 *supra*, p 138

of the surrounding political considerations. Furthermore, as mentioned in the preceding chapter, the condition of proportionality would limit the degree of force employed to what is reasonably necessary to promptly secure the permissible objectives.⁹³ Hence, in the present case, the US and the UK would not be able to justify coercive measures unnecessarily taken to achieve the restoration of international peace and security in the region. Accordingly, there is no need to employ a restrictive interpretation of Security Council Resolution 678 and challenge the principle of natural and ordinary meaning of the words, as there is a condition already serving the same function. Finally, even if it is accepted that the term “restor[ing] international peace and security” is not clearly defined in the text of Resolution 678, a systematic interpretation of Resolution 678 and Resolution 687 gives a clear definition of this phrase. Resolution 687 made it clear that the “restoration of international peace and security” in the region will be achieved by eliminating Iraq’s war-making power, as will be examined below.

Taking all the above arguments into account, one can conclude that the Council’s intention was broader than merely driving the Iraqi troops out of the Kuwaiti territories and consequently, the mandate of Resolution 678 was not terminated by achieving this goal. In other words, the drafters’ will was to accomplish some other goal or goals alongside the obvious one; therefore, they deliberately adopted such broad language.

C.2.2 Systematic interpretation in connection with Resolutions 686 and 687

To achieve an exact understanding of the literal meaning of the language of Resolution 678 and to investigate the intentions of the founders, Resolution 678 should be interpreted in light of all other resolutions concerning the present case, in particular, Resolutions 686 and 687. As mentioned above, this proposition is consistent with the “systematic” principle of interpretation and the provisions of Vienna Convention. Resolutions 686 and 687 fell into the category of

⁹³ See Chapter 3, section D

“agreements relating” to the context of Resolution 678 according to Article 31(2) (a). They are also “subsequent agreements” that should be taken into account in interpreting the latter, according to Article 31(3) (a) of the Convention.

Resolution 686 laid down basic terms of the “definitive end to the hostilities” after the U.N. coalition had unilaterally suspended offensive combat operations. In this resolution the Council expressly preserved the authorization in Resolution 678 to use “all necessary means”, including the use of force, to ensure compliance with the cease-fire obligations.⁹⁴ Although Resolution 687 did not use the same explicit language, it recalled and affirmed all the thirteen previous resolutions.⁹⁵ It was argued, in the context of Resolution 678, that the term “restore” used in the text shows that the Council intended nothing more than to expel Iraq from Kuwait; “restoration means returning to the *status quo* prior to the Iraqi invasion of Kuwait.”⁹⁶ However, this interpretation seems to be implausible when read in the light of Resolution 687. In the Preamble of the latter resolution the Council welcomed “the restoration to Kuwait of its sovereignty, independence and territorial integrity and the return of its legitimate Government,”⁹⁷ however, the Council did not welcome the restoration of “international peace and security in the area.” Hence, the term “restore” in Resolution 678 was not intended to refer to the *status quo* prior to the invasion, but was connected to the term “international peace and security in the area.” This statement confirms the view that the Council intended some other goal or goals along with the liberation of Kuwait.

In the carefully worded preamble of Resolution 687 the Council expressed concerns about the intentions of the Iraqi regime and reaffirmed “the need to be assured of Iraq’s peaceful intentions

⁹⁴ See Chapter 5, section A.1

⁹⁵ Resolution 687 of 3 April 1991

⁹⁶ Ratner, note 67 *supra*, p 140, at footnotes

⁹⁷ Preamble of Resolution 687 of 3 April 1991

in the light of its unlawful invasion and occupation of Kuwait.”⁹⁸ Reference was made to reports of Iraq’s failure to fulfil its obligations under the Nuclear Non-Proliferation Treaty, Saddam’s threats to use chemical weapons and Iraq’s failure to ratify the Biological Weapons Convention. Mention was also made of Iraq’s unprovoked use of ballistic missiles against Israel and its history of deployment of chemical weapons. In the light of these observations, the Council stressed the “objective of restoring international peace and security in the area as set out in recent resolutions of the Security Council”⁹⁹

The repetition of the same language used in Resolution 678 together with the hint “as set out in recent resolutions” indicates that this language was not used arbitrarily in the early resolution. The wording of the preamble linked the ultimate “objective of restoring international peace and security in the area” to the disarmament of Iraq and, in a broader scope, to “the establishment in the Middle East of a zone free... [of weapons of mass destruction]...using all available means.”¹⁰⁰ In other words, when reading Resolutions 678 and 687 together, it is obviously that the Council perceived that “international peace and security in the area” could only be achieved by eliminating Iraq’s war-making power. Furthermore, the wording of the Preamble and the following disarmament obligations imposed upon Iraq shows that simply driving Iraq out of Kuwait without reducing its military capabilities provided no guarantee that it would not commit similar aggression in the future¹⁰¹ and did not secure the ultimate objective of “restoring international peace and security in the area.” Logically, if the Council was satisfied by the achievement of driving Iraq out of Kuwait, there would be no reason for imposing such obligations as were laid upon Iraq by Resolution 687. Such obligations, coupled with the

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Resolution 687, China and the nonaligned states sought to make the disarmament of Iraq the first move towards a more comprehensive goal of regional disarmament. Johnstone, note 58 *supra*, p 16

¹⁰¹ Johnstone, *ibid*, p 21

deliberate omission of the termination the mandate of use of force, confirm the understanding that the mandate of Resolution 678 could be used in upholding the purposes of Resolution 687. Section (C) of the resolution requires the neutralization of Iraq's weapons machinery, monitoring of its future programme, and reaffirmation of its obligations under Nuclear Non-Proliferation Treaty and the 1925 Geneva Protocol, and its ratification of the Biological Weapons Convention of 1972. These conditions, in fact, had little relation to the invasion of Kuwait, since, apart from the Scud missile attacks, Saddam had not used weapons of mass destruction during the war.¹⁰² Two reasons can be cited for this disparity. First, Iraq had just committed its second unlawful act of aggression within ten years. Its manifest willingness to resort to force therefore justified the imposition of arms restrictions. Second, Iraq had demonstrated the willingness to threaten with or use weapons of mass destruction, as indicated in the Preamble. Although no explicit link was made between the weapons-related obligations and enforcement of the treaties, in the Council's view, Iraq's record of violation or non-ratification was evidence that it posed an ongoing threat to international peace and security. It was for this reason that Iraq was denied a right which all other States retained unless they yielded it voluntarily.¹⁰³

At this point of interpretation, one could argue that the Council, while drafting Resolution 678—having in mind Iraqi regime's aggressive propensity, intended to formulate it in such broad language in order to leave room for further measures against Iraq, if necessary. Therefore, the authorization of use of force in Resolution 678 to “restore international peace and security in the area” could be used to achieve compliance with the disarmament obligations without the need for a new authorization or even an extension of the mandate of Resolution 678. Textual and teleological (according to its purposes and objects) interpretation of Resolution 687 would lead for the same meaning that the Council intended—among other objectives—to disarm Iraq in

¹⁰² Ibid, p 20-1

¹⁰³ Ibid, p 21

order to restore international peace and security in the region. Therefore, when reading Resolutions 678 and 687 together (systematic interpretation) and according to the rule of “effectiveness”, one should interpret them in the most effective way to give effect to the intentions of the drafters. This view can find further support in the “subsequent practice” as a means of interpretation that reflects the understanding of the Council Members.

C.3 Teleological interpretational and the theory of implied authorization of force

In the absence of effective UN sanctions, States flagrantly breach Council resolutions or pose a threat to peace in other ways, they should be sanctioned and made to respect the will of the Council in the interest of international peace and security. However, in practice, diplomatic and political considerations may prevent the Council from explicitly authorizing measures that some or even most of its members tacitly wish or at least would accept. The Council’s inability to explicitly authorize the force that appears to be clearly necessary leads States and commentators to look for implied authorizations.¹⁰⁴ The theory of such implicit authorization in Security Council resolutions depends on the purpose of the resolution concerned, and on the ultimate purpose of the United Nations to maintain international peace and security, which may necessitate forceful action to remove threats to the peace. One suggestion is that when a State or a group of States adopts measures to enforce a Security Council resolution when the Council itself is unable to take action, those States are not acting unilaterally, but pursuant to a clearly articulated community mandate.¹⁰⁵

It could be argued, however, that such action does not rely only on a community mandate, as suggested; but also on the Council’s implicit mandate that exists in the text of the resolution. The theory of implied authorization, although it emerged out of the political necessity, has well-

¹⁰⁴ See generally, Wright, Q. “The Goa Incident”, 56 *AJIL*, 1962; D’Amato, A. “Israel’s Air Strike upon the Iraqi Nuclear Reactor”, 77 *AJIL*, 1983; Meeker, L. “Defensive Quarantine and the Law”, 57 *AJIL*, 1963

¹⁰⁵ D’Amato, *ibid*, p 587; Meeker, *ibid*, p 519-20; Ratner, note 67 *supra*, p 130-31

founded legal grounds, if applied correctly. As mentioned earlier, the teleological school of interpretation emphasizes that the text must be interpreted by reference to its objects, principles, and purposes, as declared, known, or to be presumed. Therefore, interpreting a resolution according to its purpose is not eschewing or tempering the formal textual rules. Although this approach is a secondary one, it is, sometimes, useful in the light of the political reality.

Implied powers and authorizations are important aspects of teleological interpretation derived from the resolution purposes. This theory implies that members of the UN must be granted those authorizations which are essential for the execution of the resolution when the Council is unable to move forward for some diplomatic or political reasons. Thus, when the Council declares that there is a threat to international peace and security and orders its removal, its decision is made in the interest of the international community. If such a decision is ignored or violated and the Council is unable to authorize forceful measures explicitly against this breach, it should be presumed that the Council is undoubtedly willing to enforce those decisions. In other words, when the Council is blocked for political reasons, the assumption can be made that some of its powers are assigned to the member States of the UN or regional organizations to carry out the Council's decisions and to maintain world order.¹⁰⁶ As Oscar Schachter said, "It does not make sense to conclude that failure of the Council to endorse action by a State should bar that action when it is otherwise permitted by the Charter and international law."¹⁰⁷

It may be argued that except in case of self-defence, unilateral use of force is completely banned by Article 2(4). Therefore, the use of force even to uphold Security Council resolution or maintain international peace and security needs a Council clear authorization otherwise it comes under the prohibition of Article 2(4). However, the prohibition of use of force in international relations embodied in Article 2(4) applies essentially to force that is "inconsistent with the

¹⁰⁶ Meeker, *ibid*, p 519

¹⁰⁷ Schachter, O. "United Nations Law in the Gulf Conflict", 85 *AJIL*, 1991, p 459 at footnotes

Purpose of the United Nations.” This is obviously not the case when a State or group of States uses force to enforce a Security Council resolution. Furthermore, it has been argued that if States are permitted to take unilateral military action on the basis of creative or disputed interpretations of ambiguities in Security Council resolutions or by the Council’s failure to act, Article 2(4) would be rendered meaningless. Powerful States could use that theory to justify the use of force in their own national interests.¹⁰⁸ The UN, however, will still have the final word on the matter by endorsing, acquiescing in or, on the contrary, condemning the action.

As to the present study, it is undoubted that the Council was willing to enforce its disarmament regime on Iraq as a measure deemed essential to “restore peace and security in the region.” However, owing to some political considerations, the Council did not explicitly authorize the use of force to achieve that goal. Nevertheless, depending on the theory of implied authorization, the clear purpose of Resolution 687 that Iraq’s war-making power must be neutralized coupled with prior authorization of force, can be interpreted to suggest that the Council implicitly authorized the use of force to accomplish the its ultimate objective of disarming Iraq, especially after the non-forcible measures including the inspection regime appeared to be fruitless. Furthermore, theoretically—if the invasion had no political motives and was not based on the national interests of the acting States—the use of force to disarm Iraq and, consequently, to bring about peace and security to the region was not “inconsistent with the Purpose of the United Nations” and, therefore, not covered by the prohibition of use of force in international relations embodied in Article 2(4). However, even if this interpretation in itself cannot be accepted as a legal basis for the use of force against Iraq, for the reasons explained above, at least, it can be considered as an ancillary ground confirming the meaning resulted from the textual interpretation of Resolution 678.

¹⁰⁸ Ratner, note 67 *supra*, p 134

C.3.1 After-the fact authorization

An interrelated theory in connection with the doctrine of implied authorization of force is the post-hoc authorization. That theory argues that Security Council authorization is not necessarily a prior authorization; instead, it could be after-the fact ratification. As one commentator suggested, “It should not be assumed that ‘authorization of the Security Council’ automatically and necessarily means prior authorization.”¹⁰⁹ Post-hoc authorization was also suggested by the USSR in September 1960, when the Soviet Representative in the Council asked the Council to endorse action had been already taken by the Foreign Ministers of the American Republics against the Dominican Republic in San Jose in the preceding month. The Soviet thinking evidently was that the Council could legitimately give its authorization after the fact.¹¹⁰

Practice of the Council on a few occasions reaffirmed this understanding. For example, in August 1990, armed forces from five member states of Economic Community of West African States (ECOWAS), without explicit Security Council authorization, intervened in Liberia to attempt to stop a civil war.¹¹¹ After the fact, the Council’s actions tacitly accepted and expressed praise for the intervention.¹¹² It was widely acknowledged that on this occasion the Security Council had implicitly authorized the use of force, and the fact that it was after the fact was uncontested.¹¹³ Again in 1998, the ECOWAS intervened in Sierra Leone to restore democracy and reinstate President Kabbah to office without explicit authorization from the Security

¹⁰⁹ Meeker, note 104 *supra*, p 520

¹¹⁰ SCOR, 893rd meeting, (8 September, 1960) p 2

¹¹¹ See generally Mgbeoji, I. *Collective Insecurity: The Liberian Crisis, Unilateralism, and Global Order*, University of British Columbia Press, 2004; Wippman, D. “Enforcing the Peace: ECOWAS and the Liberian Civil War” in Damrosch, L., (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, Council on Foreign Relations, New York, 1993

¹¹² In Resolution 788 of 19 November, 1992 the Security Council “Commend[ed] ECOWAS for its efforts to restore peace, security and stability in Liberia.”

¹¹³ Wippman, note 111 *supra*, p 185

Council. After the fact, the Council adopted Resolution 1162, commending the action.¹¹⁴ However, there is still the risk that a regional organization or individual states will be encouraged to take unilateral action in the hope of that they can later extract Security Council approval.¹¹⁵ On the other hand, some commentators have invoked the principle of implied authorization in attempt to legitimize actions which obviously were not authorized by the Council and even in cases where no resolution was issued on the matter.¹¹⁶ Therefore, it is suggested that appeal to this theory should be strictly confined to cases where there is a prior resolution (or resolutions) on the matter and the textual interpretation of this resolution (or resolutions) strongly suggests that the purposes of resolution can be achieved by military means. Of course, if these elements are present, most likely there will be no need to resort to such a means of interpretation. Hence, this proposition leads to the same result, that interpretation according to the theory of implied authorization can only be as a secondary means of interpretation to uphold the meaning arrived to by the textual interpretation, but not a legal ground on its own.

As to the case of Iraq, despite the rejection of some of Council members, the course of action adopted by the Security Council in response to the invasion can be well interpreted as acquiescence in the invasion or after-the-fact authorization. Soon after the invasion, the Council adopted Resolution 1483. In the Preamble of that resolution, the Council “welcom[ed] the commitment of all parties concerned to support the creation of an environment in which” the

¹¹⁴ Resolution 1162 of 17 April, 1998; on this case see Chapter 8, section C.2.2. Similarly, India’s seizure of Goa from Portugal in 1961 was justified as enforcing for the UNGA resolutions against colonialism. Eventually, the Security Council has acquiesced in India’s takeover of Goa which was perceived as an after-the-fact authorization. Wright, note 104 *supra*, p 617. Many commentators also viewed the Council’s subsequent actions for the NATO intervention in Kosovo in 1999 as ratification for the intervention after the fact. Louis Henkin, for example, suggested that Resolution 1244 was a “formal ratification by an affirmative vote of the Council.” Henkin, L. “Kosovo and the Law of ‘Humanitarian Intervention’”, 93 *AJIL*, 1999, p 827

¹¹⁵ Ratner, note 67 *supra*, p 132

¹¹⁶ Professor Anthony D’Amato’s suggested that the Israeli 1981 air strike against the Osiraq nuclear reactor was an example of implicit Security Council approval of an armed action. Although, the Security Council strongly condemned the air strike in Resolution 487 of 1981, however, D’Amato took this to be purely for form’s sake, because it contained no sanctions against Israel. D’Amato, note 104 *supra*, p 587

Iraqi people can freely “determine their own political future.”¹¹⁷ The Council also expressed the willingness of the United Nations “to play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance.”¹¹⁸ Importantly, the Council unequivocally “recognize[ed] the specific authorities, responsibilities, and obligations” of the occupying powers under international law.¹¹⁹ In the operative part of the resolution, the Council, acting under Chapter VII, requested Member States of the United Nations “to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice.”¹²⁰ Thus, in no way can this resolution be interpreted to mean that the Council deplored or condemned the invasion. On the contrary, the language of the resolution indicates that the Council tacitly accepted the intervention, in a post-hoc authorization.

C.4 Interpretation by practice

Assuming that there is an ambiguity in the wording of text of Resolution 678, therefore, recourse will be made to the subsequent practice to investigate the understanding of Council members for that resolution and/or to confirm the meaning arrived to through the textual interpretation. As mentioned above, in the context of Security Council resolutions, the practice of the Security Council—as an institutional organ—and that of member States must be distinguished. The practice of the Council, including the institutional decisions and the modalities for decision-making, such as authorizing the use of force or the termination of such a mandate, can be inferred from the Council’s previous and subsequent attitude in similar cases. On the other hand, the practice of member States is their attitude in carrying out a decision or practicing a mandate, which reflects their understanding of the resolution in question.

¹¹⁷ Resolution 1483 of 22 May 2003

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Ibid. Operative para. 3

When considering Council practice (as a body), a potential difficulty is whether it is possible legally to evaluate a consistent and permanent practice on the part of the Council, when the resolution concerned was keenly debated by the member States at the time of adoption and so may not reflect a consensus of opinion and intention. However, it is not necessary that the practice of the Council should represent a common or unanimous agreement among all member states.¹²¹ What is important, for interpretation purposes, is the agreement of the majority of member states, including the five permanent members, in any given case.

With regard to the subsequent practice of member States in implementing such a resolution, in theory, such practice should reflect both the historical intentions of the original supporters of the resolution and a dynamic consensus based on the resolution purpose at the time of interpretation.¹²² However, a difficulty may arise in reconciling the original intention of the founders of the given resolution and the practice of member States at the time of the interpretation. The constant changing of the Council members and the shifting of political considerations and ideologies of some permanent members will make the evaluation of such practice more complicated. Presumably the question to be asked in this context is how much of a unified practice of member States concerned can be considered a reflection of a common understanding regarding the interpretation of such a resolution. Obviously, a common practice by member States concerned may very well indicate such interpretational consensus; however, this is rare. The practice of member States is most likely to be disputed among the Council members. In case of dispute or controversy over the practice in application, the attitude of the Council in response to the practice in question should be taken into account. If the Council welcomed or acquiesced to the practice in application, that practice should be considered to reflect a common

¹²¹ Simma, note 11 *supra*, p 28

¹²² Ibid

understanding among member states. By contrast, if the Council condemned the practice, it should be disregarded and not taken into account.

C.4.1 Subsequent practice of the Council Members regarding resolution 678

In the case in question, Iraq for a period of several years was implacable in refusing to cooperate with diplomatic and other peaceful means to induce it to meet its obligations to disarm and to allow UN inspectors full access to its WMD programme. This intransigence led UNSCOM, and many States, to conclude that Iraq maintained significant biological and chemical weapons capability in defiance of the ban.¹²³ Therefore, the Security Council several times declared Iraq to be in “material breach” or “flagrant violation” of the conditions imposed by Resolution 687, and warned of “serious consequences.”¹²⁴ Moreover, Council allies more than once threatened or used force in order to fulfil the mandate of Resolution

(I) The incident of 1993

On January 7, 1993, Iraqi officials withdrew UNSCOM’s access to the Habbaniyah airfield, which meant that short-notice inspection would no longer be possible.¹²⁵ The Security Council, in a Presidential Statements, condemned Iraq’s decision and warned of “serious consequences.”¹²⁶ On January 13, 1993, the United States, the United Kingdom and France carried out air strikes on targets in southern Iraq in an attempt to restore inspectors’ access to the air facilities they needed.¹²⁷ These raids were not expressly authorized by a new Council

¹²³ Murphy, S. “Contemporary Practice of the United States Relating to International Law”, 93 *AJIL*, 1999, p 472

¹²⁴ See Chapter 5, section A.2

¹²⁵ UN Department of Public Information, *The UN and the Iraq-Kuwait Conflict*, 1990-1996 (Introduction by Boutros Boutros-Ghali, Secretary-General of the UN) UN/Sales No. E.96.I.3, 1996, p 86-7; see also Wedgwood, R. “The Enforcement of Security Council Resolution 687: The Threats of Force Against Iraq’s Weapons of Mass Destruction”, 92 *AJIL*, 1998, p 727

¹²⁶ Statements by the President of the Security Council, *UN. Docs S/25081 and S/250911* (8 and 11 January 1993)

¹²⁷ Wedgwood, note 125 *supra*, p 727

resolution. However, they were not condemned by the Council and no objection was raised by member States.¹²⁸ On the contrary, the Secretary-General Boutros Boutros-Ghali, on 14 January 1993, said, “The raid yesterday, and the forces which carried out the raid, have received a mandate from the Security Council, according to Resolution 687 concerning the cease-fire. So, as Secretary-General of the United Nations, I can say that this action was taken and conforms to the resolutions of the Security Council and conforms to the Charter of the United Nations.”¹²⁹

(II) The incident of 1998

On March 2nd, after Iraqi officials disrupted the inspection process, the Security Council adopted Resolution 1154 which approved the Memorandum of Understanding concluded between the Iraqi authorities and the Secretary-General for continuing compliance with inspection regime.¹³⁰ However, the Resolution also warned that any failure by Iraq to provide “immediate, unconditional and unrestricted access” would “have the severest consequences.”¹³¹ During the debate on this resolution, several States, Russia, China and France among them expressed the view that it could not be relied upon to provide what the Chinese delegate called “automatic authorization of the use of force against Iraq.”¹³²

In August 1998, Iraq, in breach of its renewed commitments, suspended cooperation with the UNSCOM and on October 31, 1998, Iraq formally halted all cooperation with the inspection

¹²⁸ Ibid, p 727-8

¹²⁹ Quoted in “Memorandum by the Foreign and Commonwealth Office, Iraq: Legal Basis for the Use of Force”, available at <<http://www.fco.gov.uk/cms/documentuploads/annex>>

¹³⁰ In early 1998, after the inspectors failed to gain admittance to what, at the time, were called the presidential palaces, the Council allies declared their willingness to use military force to force Iraq to comply with its obligations. In an attempt to avert tension and secure Iraq’s cooperation with the conditions of Resolution 687, the Secretary-General in February 1998 obtained a renewed declaration of commitment from Iraq. Murphy, note 123 *supra*, p 472; Wedgwood, “The Enforcement of Security Council Resolution 687: The Threats of Force Against Iraq’s Weapons of Mass Destruction”, note 125 *supra*, p 725-7; see also Memorandum of Understanding (23 February, 1998), *UN.Doc. S/1998/166* (1998)

¹³¹ Security Council Resolution 1154 of 2 March, 1998

¹³² Statement by the Chinese Representative, *UN. Doc. S/PV. 3858*, p 14, 1998; Russia p 15, France p 18

teams.¹³³ At the meeting of the Security Council on November 5, 1998, the United Kingdom Representative warned of a possible revival of legal authorization for states to use force against Iraq if the latter seriously breached its obligations under Resolution 687; the U.S. representative simply asserted that the United States had sufficient authority to use force.¹³⁴ However, on December 15, Executive Chairman Butler reported to the Security Council that the commission “is not able to conduct the substantive disarmament work mandated to it by the Security Council.”¹³⁵ The following day, in face of this evidence of Iraq’s continuing non-compliance, the UK and the USA embarked on *Operation Desert Fox*, a limited air campaign against Iraqi military sites, without new authorization from the Security Council.¹³⁶

Views in the Council towards the air strikes were, however, split. China, France, and Russia condemned them, mainly because the allies had acted without waiting for the matter to be debated at the Security Council.¹³⁷ Russia called the attack an “unprovoked act of force” that “violated the principles of international law and the principle of the Charter.”¹³⁸ On the contrary, the US and the UK repeatedly insisted that they had sufficient authority to use force against Iraq if it did not fully comply with its disarmament obligations.¹³⁹

(III) The no-fly zones and Resolution 688

The no-fly zones are an additional practice in application by States related to Resolution 678 authorization of force to “restore international peace and security in the area.” The implementation of such zones, notwithstanding that it had nothing to do with disarmament

¹³³ See letters dated 31 October, 1998 and 2 November, 1998 from the Deputy Executive Chairman of the Special Committee Addressed to the President of the Security Council, *UN.Docs. S/1998/1023 and S/1998/1032*

¹³⁴ *UN. Doc. S/PV. 3939*, (5 November, 1998); see also Murphy, note 123 *supra*, p 473

¹³⁵ Letter dated 15 December, 1998, from the UN Secretary-General to the President of the Security Council transmitting the UNSCOM and IAEA Reports, *UN Doc. S/1998/1172*

¹³⁶ Murphy, note 123 *supra*, p 474

¹³⁷ *UN. Doc. S/PV 3955* (16 December, 1998); Murphy, *ibid*, p 477

¹³⁸ Security Council Press Release, SC/6611 (16 December, 1998) p 4

¹³⁹ Security Council Press Release, SC/6611, *ibid*, UK p 5, US p 8 also Japan supported the action, *ibid*, p 9

obligations of Resolution 687, was undertaken for the same goal, namely, to “restore international peace and security in the area.” Humanitarian concerns raised by the savage aggression against dissident minorities in Iraq after the end of war led to demands for the Security Council to intervene and proposals for military action by the coalition forces.¹⁴⁰ Of particular concern was the increase in region instability caused by the flight of large numbers of Kurdish and Shiite opponents into neighbouring Turkey and Iran.¹⁴¹ In these circumstances, Resolution 688 was adopted with the support of the majority of member States, just two days after the adoption of Resolution 687.¹⁴² The resolution condemned Iraq’s repression of the Kurds and other groups as a threat to international peace and security. The Council linked the “restoration of international peace and security in the area” to the immediate “end of this repression.”¹⁴³ The resolution was regarded as providing a basis for continuing economic sanctions, but no explicit mention was made of military action.¹⁴⁴

With the continued use of force by Iraq against dissident minority refugees, France, the United Kingdom, and the United States, without recourse to or endorsement from the Council, set up no-fly zones or enclaves, in order to protect Iraqi Kurds from repression by Iraqi troops. They argued that Resolution 688 implicitly authorized the use of force for patrolling these zones and to provide safe havens to the Kurdish refugees.¹⁴⁵ Their failure to seek Council authorization was attributed to the fact that China and Russia would have opposed such a proposal.¹⁴⁶

However, the fact that the allies acted without explicit Security Council endorsement, together with the basic principle in the Charter that States should not intervene in matters essentially

¹⁴⁰ See generally Stromseth, J. “Iraq’s Repression of its Civilian Population: Collective Response and Continuing Challenges” in Damrosch, L. [ed.] *Enforcing Restraint: Collective Intervention in Internal Conflicts*, Council on Foreign Relations Press, 1993, p 77

¹⁴¹ Schachter, note 107 *supra*, p 468

¹⁴² Security Council Resolution 688 of 5 April, 1991 was adopted by a vote of 10 to 3, with two abstentions

¹⁴³ Ibid

¹⁴⁴ Schachter, note 107 *supra*, p 468

¹⁴⁵ Stromseth, note 140 *supra*, p 77

¹⁴⁶ Ibid, p 100

within another State's domestic jurisdiction, were taking by dissenting Council members as reasons for condemning the use of troops in the safety zones as serious violation of the Charter.¹⁴⁷ This was the view taken by Secretary-General Javier Perez de Cuellar, who concluded that deployment of foreign troops on Iraqi territory required either the express authorization of the Security Council or Iraqi consent.¹⁴⁸ Against this proposition, it has been argued that Resolution 688 implicitly authorized the use of force to protect Iraq's dissenting minorities. In particular, that the resolution requested the Secretary-General to "use all the resources at his disposal...to address urgently the critical needs of the refugees and displaced Iraqi population."¹⁴⁹ In fact, most of the Council members acquiesced in the safe-haven operation.¹⁵⁰

(IV) Assessment of the "subsequent practice"

The question now is whether this practice can be considered a subsequent practice of Resolutions 678 and 687 that "establishes the understanding of the parties" that "serious violation" of the disarmament obligations on the part of Iraq triggered the authorization of force of Resolution 678.

On the one hand, it could be argued that the use of force in these episodes supports the view that compliance by Iraq with its disarmament obligations was an essential part of restoring peace and security in the region, and that obstruction of the inspections was a material violation of the cease-fire.¹⁵¹ Consequently, it confirms the view that the mandate of Resolution 678, for using force, had not expired and could be used to force the disarmament obligations upon Iraq. This view is supported by the fact that the Council did not condemn these actions; therefore, its

¹⁴⁷ Schachter, note 107 *supra*, p 469

¹⁴⁸ Ibid

¹⁴⁹ Ibid, p 469 at footnotes; Stromseth, note 140 *supra*, p 100

¹⁵⁰ Ratner, note 67 *supra*, p 132

¹⁵¹ Yoo, note 6 *supra*, p 569; Wedgwood, "The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence", note 64 *supra*, 579

posture can be considered as one of acceptance or acquiescence to the practice in application, despite the disputes raised by some members.

On the contrary, arguments can be made to suggest that these actions cannot be taken as subsequent practice because they did not represent a common understanding among the members of the Council, especially as some members, including three of the permanent members, expressed the view that resolutions condemning the Iraqi violations for its cease-fire obligations did not “automatically” revive the mandate of Resolution 678 and further negotiation among the Council members would be required to use force in response to the Iraqi defiance. In addition, the fact that the Council did not condemn the actions taken by the US, the UK and France, in the 1993 episode only, was not a sign of approval or acquiescence on the part on the Council. This silence on the part of the Council was due to the political reality that the Council almost certainly would be blocked from condemning the practice in application by the veto power of those members.

From a purely legal viewpoint, leaving aside the political factors, the argument advanced by China, France, and Russia in 1998 that the matter should have been debated at the Security Council before the action was undertaken undermines the legal status of UN Security Council enactments.¹⁵² In 1991, the members of the Security Council unanimously agreed to authorize the use of force against Iraq, an agreement expressed in the written text of Resolution 678. The text had not been altered, nor circumstances changed, since then. If the current members of the Security Council disagreed with Resolution 678, they could have repealed it. The view that Resolution 678’s authorization was invalidated by the different opinions of some of the current

¹⁵² Yoo, *ibid*, p 568

members of the Council would reduce Council resolutions to the status of recorded temporary diplomatic agreement, rather than legal enactments with lasting effect.¹⁵³

Against this proposition, it might be argued that those States could not repeal Resolution 678 because the US and the UK would simply veto any attempt to do so. However, in the face of the veto power, resort can be made to the General Assembly to decide on the matter. This is not a theoretical assumption; on some occasions in the past, when the Council was blocked by veto, such resort to the General Assembly was made, as in the cases of Korea in 1950 and the Suez crisis in 1956. Furthermore, the argument advanced by China, France and Russia implicitly suggests that every succeeding resolution is to be considered initially as an alteration to the original resolution, unless the current members agree that it was not intended as such. One could ask why this intention was written in the text of the resolution, although it is generally accepted that any legal text should be drafted in way that gives full effect to the intentions of the founders. The view adopted by those three States treats Security Council resolutions as ad hoc executive edicts, rather than legislative acts. Accepting such a position would leave considerable doubt as to their legal force and period of effectiveness.¹⁵⁴ Finally, from a political point of view, France's contradictory positions in 1993 and 1998, although the facts regarding the Iraqi resistance had not changed, illustrates how changes in national ideologies would affect the interpretation of Council resolutions and, consequently if followed by the Council, would lead the Council to lose its credibility and cause instability in world affairs.

The argument advanced here finds support in the view expressed by the UN Secretary-General, Kofi Annan when he brushed aside any suggestion that a new Council resolution was needed for military action. In March 1998, when he was asked whether any future forcible action would require a new Security Council resolution, he gave a careful answer, saying that the United

¹⁵³ Ibid

¹⁵⁴ Ibid

States had consulted broadly during the recent events, and would undoubtedly continue to do so. He went on to say, “If the US had to strike I think some sort of consultation would be required.”¹⁵⁵ This careful answer, with its significant omissions, may well recapitulate the international law governing the continuing problem of the enforcement of Resolution 687. Thus, one can conclude that since the Council or the General Assembly of the United Nations did not condemn the actions taken by the US and the UK in 1993 and 1998 and France in 1993 these practices, although controversial, reaffirmed the understanding that the authorization of force in Resolution 678 was not expired and could be used in forcing the disarmament obligations upon Iraq. This proposition is enhanced further by the practice of France, the United Kingdom and the United States in establishing the protective enclaves in northern and southern Iraq. This operation and the fact that most of Security Council members acquiesced in it, confirms the understanding that the mandate of Resolution 678 did not expire after the cease-fire but rather covered other measures—as decided by the Council—to ensure peace and security in the region.

C.4.2 The Council’ practice in terminating the authorization of force

The question almost certainly to be asked, is would the Council authorization of using force established by Resolution 678 remain forever? Exploring the practice of the Council in similar occasions can manifestly answer this question. The Security Council has not readily authorized the use of force in the past, nor has it rescinded those decisions lightly. When the Security Council has taken the significant step of terminating its authorization to use force, it has only done so in one of two ways: either by expressly declaring the end of the prior authorization or by setting an up-front time limit on the authorization.¹⁵⁶ In the case of Bosnia, for example, the Security Council ended the legal authority for the use of force by expressly terminating the

¹⁵⁵ *This Week : Remarks of Secretary-General Kofi Annan* (ABC television broadcast, 8 March, 1998), in Fed. Doc. Clearing House, Transcript No. 98030802-j12, available at Lexis/Nexis Library, News File

¹⁵⁶ Yoo, note 6 *supra*, p 567

previous authorization in a separate resolution. Security Council's Resolution 1031 (1995) decided that "the authority to take certain measures conferred upon states by [various resolutions] shall be terminated."¹⁵⁷ In the case of the UN mission in Somalia, when the Security Council extended the authorization, in Resolution 954 (1994), it clearly established that this was for a "final period" until 31 March, 1995.¹⁵⁸ Furthermore in the case of Rwanda, Resolution 929 specified that "the mission of Member States cooperating with the Secretary-General will be limited to a period of two months following the adoption of the present resolution, if not earlier."¹⁵⁹ With regard to the case of Haiti, the Security Council preferred to reserve for itself the role of deciding whether the conditions for termination of its mandate had been fulfilled. In Resolution 940 the Council decided that "the multinational force will terminate its mission....when a secure and stable environment has been established... [as determined] by the Security Council, taking into account recommendations from the Member States of the multinational force."¹⁶⁰ Security Council practice has been consistent on this point over a many years. Resolution 678, by contrast, contains no such time limit, nor has any resolution been adopted relating to Iraq, explicitly ending the resolution's mandate for the use of force. In the absence of any explicit expression by the Council, using such terms as in the past, that it has terminated Resolution 678's authorization for the use of force, any such authorization would remain valid.

Conclusion

The natural and ordinary meaning of the text of Resolution 678 clearly indicates that the Council's intention was broader than merely driving the Iraqi troops out of the Kuwaiti territories and consequently, the mandate of Resolution 678 was not terminated by achieving this goal. The

¹⁵⁷ Security Council Resolution 1031 of 15 December, 1995

¹⁵⁸ Security Council Resolution 954 of 4 November, 1994

¹⁵⁹ Security Council Resolution 929 of 31 March, 1995

¹⁶⁰ Security Council Resolution 940 of 31 July, 1994

drafters of this resolution were willing to accomplish some other goal or goals alongside the obvious one; therefore, they deliberately adopted such broad language. Although this additional goal was not specified in the text of Resolution 678, the Council elucidated its object in the subsequent Resolution 687 when it determined that “international peace and security in the area” can only be achieved by disarming Iraq and eliminating its war-making power. Thus, when reading Resolution 678 in light of Resolution 687, according to the systematic rule of interpretation, it becomes clear that the authorization of force can be used to liberate Kuwait “and to restore international peace and security” by enforcing the disarmament regime upon Iraq by forcible means, if necessary. As a result, no fresh authorization was needed. This meaning arrived to by the textual interpretation can also be reached by the teleological approach and according to the principles of implied authorization.

Furthermore, analysis of the practice of member States is their attitude in carrying out the mandate of Resolution 678, although controversial, reaffirmed the understanding that the authorization of force in Resolution 678 was not expired and could be used in forcing the disarmament obligations upon Iraq, especially that these practices were not condemned by the Security Council or the General Assembly of the United Nations. This understanding of Resolution 678 is further supported by the practice of the Security Council in termination its authorization of force. Examination of these practice shows that the Council is consistent on terminating the mandate of force either by expressly declaring the end of the prior authorization or by setting an up-front time limit on the authorization. Neither of those explicit expressions has been articulated regarding Resolution 678, therefore, the mandate of that resolution remains valid. Finally, the attitude of the Council after the end of *Operation Iraqi Freedom* indicates that the Council tacitly accepted the intervention, in a post-hoc authorization.

Chapter 5

Security Council Resolution 687 and the Law of Armistice

Introduction

As mentioned in the preceding chapter, US and UK officials claimed that the finding that Iraq was in material breach of its obligation under the cease-fire agreement (Resolution 687) gave rise to the right of the coalition forces to suspend or terminate the cease-fire and resume hostilities without new authorization of use of force.¹ This argument, however, has been dismissed by some members of the Council, arguing that a material breach by Iraq of its obligations under Resolution 687 does not “automatically” authorize the US and the UK to resume hostilities and, to do so requires a new explicit authorization of use of force by the Council.²

This chapter investigates the validity of the US and the UK claim under the rules of armistice in international law. The first section will highlight the cease-fire Resolution 687 and the related resolutions which determined that Iraq was in material breach of the cease-fire obligations. The second will examine the pertinent rules of customary international law on the subject of armistice agreements and whether these rules have been affected by the law of the UN Charter in order to determine the applicability of these rules to the present case. The third section focuses on the Vienna Convention’s rules on the termination of treaties and the extent to which those rules may be applied in case of violation of a cease-fire agreement.

¹ See, for example, Letter dated 20 March 2003 from the Permanent Representative of the United States to the President of the Security Council, *UN Doc. S/2003/351*; Lord Goldsmith, the UK Attorney General, “Memorandum on the legality of military action against Iraq”, available at <http://www.ico.gov.uk/upload/documents/library/> [Hereinafter Lord Goldsmith’s Memorandum]; see also section A.2 below and Chapter 7, section D.2

² See statements made by the Representatives of France, Russia, China, Mexico and Syria after the adoption of Resolution 1441, *UN Doc. Press Release, SC/7564* (8 November, 2002); see also note 25 *infra*

Section A: The cease-fire agreement between Iraq and the Coalition forces

A.1 The cease-fire Resolutions 686 and 687

On March 2nd, 1991, the Security Council adopted Resolution 686, which brought a provisional end to the hostilities.³ Resolution 686 laid down basic terms for a “definitive end to the hostilities” after the coalition had unilaterally suspended offensive combat operations.⁴ Although it imposed relatively limited obligations on Iraq, it expressly preserved the authorization in Resolution 678 to use “all necessary means”, including military intervention, to ensure compliance.⁵ One month later, the Council adopted Resolution 687 which explicitly established “a formal cease-fire ... between Iraq and Kuwait, and the [UN] Member States cooperating with Kuwait in accordance with Resolution 678 (1990).”⁶ Thus, the parties to this armistice agreement were Iraq, on the one hand, Kuwait and the members of the coalition forces, including the United States and the United Kingdom, on the other.

In contrast to Resolution 686, Resolution 687 set out much broader conditions to be met before enforcement measures generally including economic sanctions and disarmament obligations would be ended. After affirming all thirteen resolutions adopted by the Security Council since the outset of the crisis and the relevant substances, the Council went on to stipulate the terms and conditions upon which the cease-fire agreement would be established. The sanctions and conditions imposed on Iraq in that resolution fell broadly into three categories. The first concerned Iraq’s military capabilities. The second concerned Iraq’s liability for loss and damage

³ Security Council Resolution 686 of 2 March, 1991. From explanations of votes of most of the Council Members in drafting this resolution, it is apparent that most of expected a full-blown cease-fire to follow. See generally *UN.Doc. S/PV 2978*

⁴ The cease-fire on the ground was achieved when President Bush ordered a unilateral suspension of offensive combat operation on 28 February, 1991. Freedman, L and Karsh, E. *The Gulf Conflict 1990-1991: Diplomacy and War in the New World Order*, Faber and Faber, London, 1993, p 405

⁵ The Council intention to preserve the authorization of force clearly appeared in the language of Resolution 686. In the first paragraph the Council expressly stated that “all twelve resolutions noted above [including Resolution 678] continue to have full force and effect.”

⁶ Security Council Resolution 687 of 3 April, 1991

to foreign governments, nationals and corporations arising from the invasion and occupation of Kuwait, including environmental damage and the depletion of natural resources. The third concerned the boundary between Iraq and Kuwait.⁷ For the purpose of this study, the present section will highlight only the first category.

Acting under Chapter VII, the Security Council decided in Part C paragraph 8 of the resolution that Iraq “shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:

All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities;

All ballistic missiles with a range greater than 150 kilometers and related major parts, and repair and production facilities”⁸

In order to implement this disarmament regime, the resolution provided for the creation of a UN special commission to carry out “on-site inspection of Iraq’s biological, chemical and missiles capabilities,” and ordered Iraq to yield such weapons to the commission for “destruction, removal or rendering harmless.”⁹ Resolution 687 was without precedent in UN history, in the extent of the terms imposed on a defeated belligerent. No previous cease-fire or armistice agreement sponsored by the UN had imposed such a stringent disarmament regime.¹⁰ The severity of the terms of Resolution 687 and the inclusion of these weapons can be seen as a reflection both of the extent of Iraq’s military defeat and States’ perceptions of the threat posed by Iraq’s military aggression.¹¹ These intrusive requirements can also be seen as a response to Iraq’s record of violence and misuse of weapons of mass destruction, both within and beyond the

⁷ Schachter, O. “United Nations Law in the Gulf Conflict”, 85 *AJIL*, 1991, p 456

⁸ Security Council Resolution 687 of 3 April, 1991

⁹ Ibid

¹⁰ Freedman, L and Karsh, E. *The Gulf Conflict 1990-1991: Diplomacy and War in the New World Order*. Faber and Faber, London, 1993, p 416

¹¹ Morriss, D. M. “From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations”, 36 *Virginia Journal of International Law*, 1996, p 893

State's borders.¹² Hence, the cease-fire was made contingent on a solemn promise to give up its military capabilities,¹³ as an assurance of Iraq's "peaceful intentions" towards its neighbours and, subsequently, as a part of post-conflict efforts to restore international peace and security in the region.

Resolution 687, in its final part, expressly stated that cessation of offensive military operations by the coalition forces depended on the Secretary-General and the President of the Security Council being notified of Iraq's acceptance of these terms and conditions. Iraq formally accepted Resolution 687; however, it protested that the sanctions imposed in this resolution were illegal and unfair.¹⁴ The negotiation history of Resolution 687 shows that the disarmament obligations were proposed by the coalition forces and that Iraq's acceptance and compliance with these obligations was indispensable for the coalition forces to discontinue their offensive combat operations. It has even been reported that the UK threatened to use the veto in the face of any objection against this proposal.¹⁵

A.2 Iraq's non-compliance with the terms and conditions of Resolution 687

Only four months after the adoption of Resolution 687, the Security Council adopted Resolution 707 condemning Iraq's "serious violation of a number of its obligations under section C of Resolution 687....which constitutes a material breach of the relevant provisions of that resolution which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region."¹⁶ In 1993, after Iraqi officials disrupted the inspection process, the President of the Security Council, in a Presidential statement, denounced the action taken by the

¹² See Chapter 2, notes 35-38

¹³ Wedgwood, R. "The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence", 97 *AJIL*, 2003, p 579

¹⁴ *UN Doc. S/22456* (1991). The question of the legality of these sanctions will be dealt with separately in the following chapter.

¹⁵ Johnstone, I. *Aftermath of the Gulf War*, International Peace Academy, Lynne Rienner Publishers, London, 1994, p 15

¹⁶ Security Council Resolution 707 of 15 August, 1991

Iraqi government as an “unacceptable and material breach of the relevant provisions of Resolution 687.”¹⁷ Subsequently, on January 11, 1993, the President, speaking on behalf of the Council, warned Iraq that “serious consequences” would flow from Iraq’s “continued defiance.”¹⁸

In 1996, the Council adopted Resolution 1060 condemning “the refusal of Iraqi authorities to allow access to sites designated by the Special Commission, which constitutes a clear violation of the provisions of” Resolution 687.¹⁹ In 1997, the Council adopted Resolutions 1115 and 1137 repeating its condemnation and the later resolution “warned... [of] serious consequences of Iraq’s failure to comply immediately and fully and without conditions or restrictions with its obligations.”²⁰ However, Iraq’s defiance continued and in 1998 it formally halted all cooperation with UNSCOM. The Council responded by adopting Resolution 1205 which condemned Iraq’s decision as a “flagrant violation of Resolution 687.”²¹ The last resolution on the matter before the invasion was Resolution 1441.²² That resolution was in many aspects equivalent to an ultimatum for the regime in Iraq that its intransigence will not be tolerated any longer.

The Preamble, for the first time, recalled in full the second operative Paragraph of Resolution 678 which authorized the use of force against Iraq in 1990. The Council, after deploring Iraq’s non-compliance with its obligations and the “absence” of international inspection in Iraq since 1998, determined that “Iraq has been and remains in material breach of its obligations under relevant resolutions.” However, it decided “to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations.”²³ In its final paragraph the resolution “warned Iraq

¹⁷ Statement by the President of the Security Council, *UN Doc. S/25081* (8 January, 1993)

¹⁸ Note by the President of the Security Council, *UN Doc. S/25091* (11 January, 1993)

¹⁹ Security Council Resolution 1060 of 12 June, 1996

²⁰ Resolutions 1115 of 21 June, 1997 and Resolution 1137 of 12 November, 1997

²¹ Resolution 1205 of 5 November, 1998

²² Resolution 1441 of 8 November, 2002

²³ *Ibid*, Operative paras. 1 and 2

that it will face serious consequences as result of its continued violations of its obligations.”²⁴ Some Council Members, in their comments on Resolution 1441, stated that the resolution eliminated “automaticity” in the use of force as a result of material breach and that if Iraq’s intransigence continued, the matter should be referred to the Council for a decision.²⁵ On the other hand, the US and the UK asserted that if Iraq did not comply with its obligations, nothing in the resolution constrained them from acting to enforce the relevant Security Council resolutions and protect world peace and security.²⁶ Overall, the unanimous view among the Council Members was that Resolution 1441 provided the last peaceful and non-forcible measures on the matter. There was a general consensus that any further defiance by Iraq would be faced by military action.²⁷ The question was, whether in case of Iraq non-compliance, such an action should be referred back to the Council or not.

In fact, the resolution does not contain any provision to suggest that a further Council resolution was needed. Furthermore, Operative paragraph 12 in the Resolution stated that the Council, after the receipting of the reports of UNMOVIC and the IAEA, would “consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security.”²⁸ The use of the word ‘consider’ (not decide) seems to uphold this understanding.²⁹ One suggestion was made by the British Attorney General that “Resolution

²⁴ Ibid, para.13

²⁵ See statements made by the Representatives of France, Russia, China, Mexico and Syria after the adoption of Resolution 1441, *UN Doc. Press Release, SC/7564* (8 November, 2002)

²⁶ See statements by the Representatives of the US and the UK, *ibid.* The UK Representative frankly stated “if Iraq chooses defiance and concealment, rejecting the final opportunity it has been given by the Council...the United Kingdom—together with other members of the Council—will ensure that the task of disarmament required by the resolutions is completed.”

²⁷ See generally statements made by the Representatives of the US, the UK, France, Mexico, Ireland, Bulgaria, Norway, Singapore, Colombia and the Secretary-General. *ibid.*

²⁸ Resolution 1441 of 8 November, 2002, operative para. 12

²⁹ In his memorandum on the legality of military action against Iraq, Lord Goldsmith, the UK Attorney General, argued that the word ‘consider’ “was chosen deliberately to indicate the need for a further discussion, but not a decision.” He went on to say “the Council knew full well...the difference between ‘consider’ and ‘decide’ and so the omission is highly significant.” *Lord Goldsmith’s Memorandum*, note 1 *supra*.

1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that Resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorize force."³⁰

In his briefing of the Security Council on 27 January 2003, the Executive Chairman of UNMOVIC, Dr. Hans Blix, stated that although there was some progress in Iraq's cooperation with the inspection teams, it had not come "to come to genuine acceptance, not even today, of the disarmament which was demanded of it."³¹ In his following briefing, days before the invasion, he said, "The question is now asked whether Iraq has cooperated "immediately, unconditionally and actively" with UNMOVIC, as required under paragraph 9 of resolution 1441 (2002)... I would say... while the numerous initiatives, which are now taken by the Iraqi side ...can be seen as "active", or even "proactive", these initiatives ... cannot be said to constitute "immediate" cooperation. Nor do they necessarily cover all areas of relevance."³²

To conclude, examination of the facts from the adoption of Resolution 687 up to the time of intervention leaves no doubt that Iraq was in material breach of its disarmament obligations under Resolution 687. For 12 years, Iraq consistently disrupted the inspection process and refused to cooperate with the UNSCOM and the IAEA. Even Members of the Security Council who opposed the use of force against Iraq in 2003 never claimed that Iraq "lived up to its obligations."³³

³⁰ Lord Goldsmith, *Legal Basis for Use of Force against Iraq*, statement by UK Attorney General in answer to a parliamentary question, 17 March, 2003. Quoted in Taft, W and Buchwald, T. "Preemption, Iraq, and International Law"; 97 *AJIL*, 2003, p 562

³¹ The Executive Chairman of UNMOVIC, Dr. Hans Blix, briefing of the Security Council on 27 January 2003, available at <<http://www.unmovic.org>>

³² The Executive Chairman of UNMOVIC, Dr. Hans Blix, briefing of the Security Council on 7 March 2003, available at <<http://www.unmovic.org>>

³³ Yoo, J. "International Law and the War in Iraq", 97 *AJIL*, 2003, p 566

Section B: The customary rules on armistice and the effect of UN Charter

Before examining the customary rules on armistice, it should be noted that, in the legal literature, there is confusion regarding the precise meaning of the terms, “armistice,” “truce,” and “cease-fire.” Some writers have entered into a lengthy discussion in an attempt to find clear distinctions between these terms, but no agreement has been reached.³⁴ For the purpose of this study, however, the important point to be mentioned is that the Security Council has used these terms interchangeably, though, since 1948, the expression “cease-fire” has been more common. Nevertheless, the Council practice suggests that by this term it intends no more than the definition of “armistice” in its traditional sense.³⁵

B.1 The Hague regulations on armistice

For hundreds of years, the armistice agreement has been the favoured mechanism of belligerent parties to end hostilities in international conflict. The customary rules on armistice have their origins in Medieval times. Hugo Grotius used the term truce to mean an agreement by which parties for a time refrain from warlike acts, though the state of war continues—“a period of rest in war, not a peace.”³⁶ With the beginning of the codification of international law in the second half of the nineteenth century, the customary rules of warfare were either restated and codified, or developed at the Brussels Conference of 1874 and at The Hague Peace Conferences of 1899 and 1907.³⁷ These Conferences were only of a declaratory effect; simply codifying or restating existing customary rules.

³⁴ See generally Baxter, R. *Armistice and Other Forms of Suspension of Hostilities*, 149 *Recueil des Cours de l'Academie de Droit International (R.C.A.D.I.)*, 1977. Bailey, S. “Truces and Armistices in the Practice of the UN Security Council,” 71 *AJIL*, 1977

³⁵ The majority, however, agree that these terms are synonymous and have been used by the Security Council interchangeably. See, for example, Levie, H. “The Nature and Scope of Armistice Agreement,” 50 *AJIL*, 1956, p 880; Morriss, note 11 *supra*, p 809-10; Bailey, *ibid*, p 468

³⁶ Grotius, H, *De Jure Belli Ac Pacis Libri*, Book III, sections I and II, (translation by Francis W. Kelsey) and Introduction by James Brown Scott, Wildy & Sons LTD. London, reprinted 1964, p 832

³⁷ Cassese, A. *International Law*, second edition, Oxford University Press, Oxford, p 400

On the subject of armistice, Article 47 of the Declaration of Brussels stated that “an armistice suspends military operations by mutual agreement, between the belligerent parties.”³⁸ Precisely the same clause was stated by Article 36 of the Annex to the 1907 Hague Convention; Regulations Respecting the Laws and Customs of War on Land.³⁹ The term “suspend” is a clear indication of the temporary nature of such agreements. Therefore, a distinction must be made between an armistice agreement and a peace treaty. The latter is the final and complete cessation of hostilities which ends the state of war between belligerent parties; an armistice is an agreement between the belligerent parties to a formal but temporary cessation of hostilities, without ending the state of war; “an armistice is not a peace treaty.”⁴⁰

As to the case of violation, the traditional customary law permitted a party to an armistice to abandoned the agreement and resume fighting if the other party violated the terms and conditions of that agreement. According to Grotius, if a truce was violated, the injured party was free to resume hostilities “even without declaring war.”⁴¹ In his view there would be no need for a new declaration of war, since the state of war was “not dead, but sleeping.”⁴² This rule was also codified in Article 51 of the Declaration of Brussels of 1874. The article stated that “the violation of the armistice by one of the parties gives the other party the right of denouncing it.”⁴³ The problem with this rule was that a belligerent could denounce an armistice for breach of even a minor condition. The Hague Convention of 1907 tried to overcome this shortcoming by

³⁸ Declaration of Brussels of 27 August, 1874 available at <<http://www1.umn.edu/humanrts/instree/1874a.htm>> The term “cease fire” is exactly of the same meaning of “armistice”, as correctly observed by Bailey Bailey, A cease-fire “is simply a suspension of acts of violence by military and paramilitary forces, resulting from the intervention of a third party. It is a preliminary and provisional step, providing a breathing space for the negotiation of more lasting agreements.” Bailey, note 34 *supra*, p 469

³⁹ Annex to the 1907 Hague Convention; Regulations Respecting the Laws and Customs of War on Land, printed in Roberts A and Guelff, R. *Documents on the Laws of War*, Oxford University Press, third edition, 2000, p 80

⁴⁰ Bailey, note 34 *supra*, p 462

⁴¹ Grotius, note 36 *supra*, p 838-9

⁴² Ibid, p 834

⁴³ *Declaration of Brussels*, note 38 *supra*

confining the right to denounce the agreement and resume hostilities to “serious violation.”⁴⁴

Article 40 stated, “Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.”⁴⁵

The majority of the Hague Convention rules on warfare, including the rules of armistice, have been accepted as customary law and were subsequently accepted by the Nuremberg Tribunal as a statement of customary international law and so constitute the most reliable indication of the consensus of the international community.⁴⁶ Furthermore, although some of the Hague rules were revised or updated by more recent agreements such as the four Geneva Conventions of 1949 and the 1977 Protocols,⁴⁷ the Hague rules on armistice remain unchanged. Up till now, no convention has supplanted or revised these rules. Thus, these customary rules apply to any international conflict and no belligerent could argue, for example, that it was not party to the Hague Convention, so it is not bound by its provisions. All States are bound in their international relations by the existing customary international law rules. The Security Council in many international conflicts explicitly urged the belligerent parties to abide by the Hague regulations of warfare.⁴⁸

B.2 The effect of the UN Charter on the customary law on armistice

Some scholars argue that there are a number of essential differences between a cease-fire reached in response to UN resolutions, and previous arrangements negotiated between the parties themselves, in the context of a legal regime where the use of force was one of the sovereign

⁴⁴ Morriss, note 11 *supra*, p 810

⁴⁵ Annex to the 1907 Hague Convention; Regulations Respecting the Laws and Customs of War on Land, printed in Roberts A and Guelff, R. *Documents on the Laws of War*, Oxford University Press, third edition, 2000, p 80

⁴⁶ Morriss, note 11 *supra*, p 810

⁴⁷ Cassese, note 37 *supra*, p 401

⁴⁸ See, for example, Resolutions 1472 of 28 March, 2003 and Resolution 1483 of 22 May, 2003

rights of States.⁴⁹ According to this view, an U.N.-imposed cease-fire order or decision (binding cease-fire resolution) differs from traditional armistice in being of unlimited duration, freezing hostilities pending the negotiation of a more lasting, durable peace.⁵⁰ The rationale for this claim is that when the Security Council acts under Chapter VII to order a cease-fire, it is exercising the authority conferred on it by the Charter to maintain international peace and security. Richard Baxter argues that “the contemporary agreements on the suspension of hostilities reflect the fundamental changes that have been effected in international law by the United Nations Charter. The threat or use of force against the territorial integrity or political independence of a State has been made unlawful, and the Security Council has been vested with the power to call for an end of the use of force in particular case. Thus the conclusion of an agreement for the suspension of hostilities reflects not so much a free decision by the parties that they will cease to exercise a right or privilege to employ force as an acceptance by them of the obligations of the Charter not to resort to the use of force. This consideration is valid whether or not the agreement is concluded under the auspices of the United Nations.”⁵¹ Consequently, the Council is not merely facilitating negotiations between the parties, but instead asserts itself to counter aggression or demand that certain terms be accepted as measures necessary to preserve peace.⁵²

This view likens the Security Council resolution to cease-fire under Chapter VII to a military order “from a superior to a subordinate to cease-firing, and thereby, to stop all means of hostilities under the subordinate’s control.”⁵³ What this view seems to say is that under the Charter legal framework a cease-fire does not depend on the consent of the parties and denies them the right to negotiate and bargain the terms of the agreement. However, this view

⁴⁹ Morriss, note 11 *supra*, p 822-3; Baxter, note 33 *supra*, p 382-5; Simon, E. “The Operation of the Korean Armistice Agreement, *Military Law Review*, 1970, p 126-7

⁵⁰ Morriss, *ibid*, p 803

⁵¹ Baxter, note 34 *supra*, p 384

⁵² Morriss, note 11 *supra*, p 808

⁵³ *Ibid*, p 812

challenges the very idea of armistice agreements. The key notion underlying an armistice, as shown above, is that the belligerent parties agree to suspend “military operations by mutual agreement.” Thus, the consent of the parties and a balancing of their interests are indispensable factors for the conclusion of an armistice and accordingly for its survival. Therefore, it is highly unlikely that States would accept this view.

As to actions taken under the authority of the Security Council, proponents of the foregoing view argue that when a UN enforcement action results in a complete military victory, as it did in the Gulf campaign, cease-fire and peace treaty are intended as the “final resolution of the conflict.”⁵⁴ By implication, in the case of Iraq, Resolution 687 was in fact a peace treaty, not an armistice. This argument, however, is fundamentally flawed. Resolution 687 was basically an armistice—unlike a peace treaty, it did not terminate the state of war, but merely suspended hostilities. As Professor Dinstein pointed out, “a labelling of Resolution 687 as a ‘permanent cease-fire’ is a contradiction in terms: a cease-fire, by definition, is a transition-period arrangement”⁵⁵ If the Council regarded Resolution 687 as a final peace treaty, it would not have imposed such rigorous obligations upon Iraq to ensure that it would not resume its aggression and warned it of “severe consequences” in case of non-compliance. The Council in the Preamble of Resolution 687 clearly expressed doubts regarding Iraq’s “peaceful intentions.” It also expressed its concern about Iraq’s “unprovoked attacks” by ballistic missiles against Israel and its threat to “make use of terrorism against targets outside Iraq.”⁵⁶ In light of this scepticism, it is irrational to say that the Council, before being assured of Iraq’s peaceful intentions, deemed appropriate to conclude a peace treaty by Resolution 687 at this time.

⁵⁴ Ibid, p 815

⁵⁵ Dinstein, Y. *War, Aggression and Self-Defence*, third edition, Cambridge University Press, Cambridge, 2001, p 50

⁵⁶ Resolution 687 of 3 April, 1991

In another deviation from the traditional rules of armistice, it has been suggested that, under the law of the UN Charter, a violation of a U.N.-backed cease-fire provides no right of unilateral denunciation and reprisal, but only a response in self-defence if a new aggression occurs. In other words, the existence of a UN cease-fire narrows the scope for resuming hostilities in the event of a violation, and changes a basic principle of the traditional armistice that viewed serious violations as a material breach of the agreement that could justify an immediate resumption of hostilities.⁵⁷ Therefore, irrespective of the possible failure of important aspects of U.N.-sponsored armistice or cease-fire agreements such as verification regimes or implementation mechanisms, the fundamental obligation not to resort to force as a means of dispute settlement is severable and is still binding.⁵⁸ Lobel and Ratner supported this view, arguing that the UN practice prior to the Gulf War upholds this approach to cease-fire law under the Charter. They pointed to some occasions during the Middle East conflicts between Israel and Arab States where the Security Council and UN officials strongly asserted that violations of cease-fire or armistice were not legal grounds for forceful countermeasures by individual States.⁵⁹ Three UN Documents have been cited in this respect, which are worth briefly highlighting:

First is the Report of UN Mediator on Palestine to the belligerent parties in the Arab-Israeli conflict. In 1948, the Security Council adopted Resolution 54 which imposed a cease-fire between Arab States and Israel and “instruct[ed] the Mediator to supervise the observance of the truce.”⁶⁰ Pursuant to this resolution, the UN Mediator, Count Bernadotte, sent to the belligerent parties instructions interpreting the Council’s resolution to mean that “(1) no party may unilaterally put an end to the truce. (2) No party may take the law into its own hands and decree

⁵⁷ Morriss, note 11 *supra*, p 822

⁵⁸ *Ibid*, p 822-3

⁵⁹ Lobel, J. and Ratner, M. “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime”, 93 *AJIL*, 1999, p 146

⁶⁰ Resolution 54 of 15 July, 1948

that it is relieved of its obligations under the resolution of the Security Council because in its opinion the other party has violated the truce. The latter is not an agreed truce negotiated by the parties and which may be terminated as stipulated by them or according to certain rules.”⁶¹

The second document is the Security Council Resolution 56 of August 19, 1948. Despite Count Bernadotte’s instruction, the Israelis and Arabs continued violations of the truce, claiming in justification violations by the other party.⁶² In response, the Security Council adopted Resolution 56 reaffirming that “no party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliations against the other party; No party is entitled to gain military or political advantage through violation of the truce”⁶³

The third is the Report of the Secretary-General to the Security Council on the Palestine Question. After the exacerbation of hostilities in the Middle East, the Council adopted Resolution 113 “request[ing] the Secretary-General to undertake....a survey of the various aspects of enforcement of and compliance with the four General Armistice Agreements andto arrange with the parties for the adoption of any measures ...would reduce existing tensions along the armistice demarcation lines.”⁶⁴ During the Secretary-General’s negotiations with the parties of the conflict, both Israel and Egypt sought an interpretation of the armistice whereby, as under pre-Charter customary international law, each party would be entitled to take reprisals in response to the other’s violations.⁶⁵ In his Report to the Security Council, the Secretary-General, Dag Hammarskjöld, rejected that view, arguing that “compliance [with the armistice] should be

⁶¹ Cablegram dated 7 August, 1948 from the UN mediator, Count Bernadotte, to the UN Secretary- General, *UN Doc. S/955* (1948)

⁶² For a detailed account of the violations of the cease-fire on both sides, see Bailey, S. *How Wars End: the United Nations and the termination of armed conflicts, 1946-1964*. Vol. 1, Oxford Clarendon Press, Oxford, 1982

⁶³ Resolution 56 of 19 August, 1948

⁶⁴ Resolution 113 of 4 April, 1956

⁶⁵ Bailey, *How Wars End*, note 62 *supra*, p 557

unconditional, subject only to resort the Security Council if attacked and the inherent right of self-defence.”⁶⁶

In conformity with the statements expressed by Count Bernadotte and Secretary-General Hammarskjöld, Lobel and Ranter argue that once the Security Council has ordered or decided that a cease-fire is necessary to maintain international peace and security, the parties are not free to reopen hostilities on the ground that the other party has violated the terms of the agreement. They may exercise the right of self-defence to repel an armed attack, but they must not renew offensive activities. Hence, in the case of Iraq, Resolution 687 has “extinguished any right of those States [the US and the UK] to resume fighting in the event of an Iraqi violation of the cease-fire agreement unless Iraq reinvaded Kuwait, retriggering Article 51.”⁶⁷

This argument, overall, seems to say that armistice agreements are things of the past and that practice under the UN Charter has completely displaced or abolished the traditional law of cease-fire agreements in the body of international law. In a sense, it eviscerates the armistice agreement’s basic principle and leaves it meaningless. However, this view is implausible for the following reasons:

First, the statements of Count Bernadotte and Secretary-General Hammarskjöld, on which this proposition was built, were expressed in the context of Arab-Israeli conflict, where the armistice agreements were unremittingly violated by both belligerent parties on grounds of violations by the other party, however, this view was not articulated or repeated by the Council or any UN officials in any other case. Therefore, obviously, it is not a consistent and frequent view of the UN, that could be generalized to all UN-sponsored armistices.

⁶⁶ Report of the Secretary-General to the Security Council, *UN Doc. S/3596* (1956). Secretary-General Hammarskjöld went further to argue that “only the Security Council could decide that a case of non-compliance was a justification for self-defence [under] Article 51.” *Ibid.*

⁶⁷ Lobel and Ratner, note 59 *supra*, p 147

Second, the weight and legal authority of these documents cannot be taken to replace a well-established customary rule. On the contrary, State practice on the matter indicates the opposite conclusion and upholds the customary rules. This can be dictated from the view expressed by Egypt and Israel in 1956 that a serious violation of a cease-fire agreement releases the other party from its obligations under that agreement.⁶⁸ The same view was expressed by Netherlands and Indonesia and was codified in the Renville Truce Agreement concluded under the auspices of the UN.⁶⁹ Paragraph 10 of this truce stated, "This agreement shall be considered binding unless one party notifies the Committee of Good Offices and the other party that it considers the truce regulations are not being observed by the other party and that this agreement should therefore be terminated."⁷⁰ This paragraph was widely interpreted to mean that the belligerent parties agreed that any violation for the terms of the truce justifies countermeasures by the other party.⁷¹ Thus, one can conclude that State practice does not reflect agreement with the view expressed by Count Bernadotte and Hammarskjold. Even Morriss agreed with this conclusion; he admitted that this suggested rule is "not perfectly reflected in practice."⁷²

Third, in practice, it is apparent that this proposition is unrealistic and no cease-fire agreement could survive under this formula. The corollary of this proposition is that a party to a cease-fire will feel free to infringe the terms and conditions of that agreement since he is confident that other party is prohibited from repudiating the cease-fire and renewing hostilities on the grounds of violation. As a political reality, this view simply allows the party violating the armistice to benefit from the prolonged process of the Council or from differences between the five Permanent Members of the Security Council. The practice of the Security Council shows that

⁶⁸ See note 65 *supra*

⁶⁹ Truce Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia, 17 January, 1948. Reprinted in UN Doc. S/649/Rev. (1948)

⁷⁰ *Ibid*

⁷¹ See, for example, Levie, note 35 *supra*, p 880

⁷² Morriss, note 11 *supra*, p 904

many cease-fire agreements ordered by the Council have been violated and the Council took no effective response against the defaulting party, in most cases the Council's reaction was no more than condemnation. The Korean Armistice Agreement is an example in place.⁷³

Moreover, the formula suggested the a UN-sponsored cease-fire does not authorize its parties to resume hostilities in case of violation by the other party—except if a new aggression occurs or authorization is given by the Security Council—does not give an answer for many issues usually associated with cease-fire agreements. In some cases, the cease-fire agreement had been implemented while one belligerent occupied territories that belonged to the other belligerent or belligerents, as in the case of the Arab-Israeli conflict. Does this formula suggest that the State which has part of its land occupied has lost its right to resume fighting in order to push back the occupier to the border and liberate its occupied territories? If it did so, would the defending State be considered in violation of a binding cease-fire agreement sponsored by the Council? It might be argued that, in that case, a State should seek a peaceful solution or it must obtain a prior permission from the Council to liberate its occupied territories. But, what if the Security Council failed to bring back the situation to the *status quo ante bellum*, as in the case of Arab territories still occupied by Israel after nearly 60 years from the original armistice? Additionally, it is likely that the Council could be blocked from acting by veto of one of the Permanent Members. In both situations, according to this formula, a State which has a part of its soil occupied by foreign troops, seems to have lost its occupied land forever and if it acted unilaterally, it would be considered in violation of the armistice. Therefore, from a practical perspective, the traditional customary rule is more realistic because it provides serious and effective remedy for the violation. On the other hand, it compels the belligerent parties to respect the terms and conditions

⁷³ Many aspects of the Korean Armistice Agreement of 27 July, 1953 have been repeatedly violated. For the Agreement see UN Doc. S/3079/Appendix A (1953). For the violations, see United Nations Command Report to the United Nations on the increase in violations by North Korea of the Military Armistice Agreement, *UN Doc. S/8217* (1967); Morriss, *ibid*, p 886-7

of the cease-fire, otherwise the hostilities will be resumed. This formula of cease-fire could be acceptable only if the mechanism of the Council worked as it was intended by the framers of the Charter. For the legal and practical reasons mentioned above, it seems that the more appropriate view is that the traditional customary law rules on armistice is still valid and has not been affected by the UN Charter. If a party to an armistice agreement seriously violates the conditions of the cease-fire, this releases the other party from its obligations under the agreement.

Section C: Violation of an agreement under the treaty law

Having examined the customary rule regulating the violation of the cease-fire agreement, this section will look at the rules regulating the suspension or termination of a treaty under Vienna Convention on the Law of Treaties.

C.1 Article 60 of the Vienna Convention

The settled view among international lawyers is that if a party to a treaty violates its terms, the other party may be justified in abrogating the treaty or suspending the performance of its own obligations under the treaty, vis-à-vis the defaulting party's rights under the treaty.⁷⁴ This principle has always been recognized in international jurisprudence. For example, in 1937, referring to this principle, Judge Anzilotti, in the *Diversion of Water from the Meuse* case, described it as "so just, so equitable, so universally recognized that it must be applied in international relations also."⁷⁵ The rationale underlying this principle is that "a party cannot be called upon to fulfil its obligations under a treaty when the other party fails to fulfil those which it undertakes under the same treaty."⁷⁶ This rule was crystallized in Article 60 (1) of the Vienna Convention on the Law of Treaties, which stated that "a material breach of a bilateral treaty by

⁷⁴ International Law Commission Reports to the UN General Assembly, *Yearbook of the International Law Commission*, vol. 2, 1966, p 253 [Hereinafter ILC Reports]

⁷⁵ Dissenting Opinion of Judge Anzilotti, *Diversion of Water from the Meuse* case, PCIJ, 1937, Series A/B, No. 70, p 50

⁷⁶ ILC Reports, note 74 *supra*, p 255

one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”⁷⁷ In the multilateral context, the Convention stated that a material breach of a treaty by one of the parties entitles a party “specially affected” by the breach to suspend the operation of the treaty in whole or in part, in relation to the defaulting State.⁷⁸ However, even if a State party was not “specially affected”, a violation that “radically changes” the position of the parties has been held to permit complete or partial suspension.⁷⁹ The ICJ observed in the *Advisory Opinion in Namibia Case* that: “the rules laid down by Vienna Convention ...concerning termination of a treaty relationship on account of breach (adopted without dissenting vote) may in many respects be considered as a codification of existing customary law on the subject .”⁸⁰ Thus, Article 60 was merely declaratory of existing customary rule.

C.1.1 Material breach

At the time of drafting of Article 60, some jurists were particularly concerned that, since there were no effective international enforcement mechanisms, innocent parties should be entitled to terminate or suspend treaties as a sanction for violation. They tended to take an absolute view of the matter, allowing the innocent party a general right to terminate the treaty in the event of violation.⁸¹ Other jurists, however, feared this might give scope for States to abuse the right by invoking trivial breaches, or making false allegations, as an excuse to free themselves from inconvenient treaty obligations. They therefore felt it would be unwise to allow such a right without control, for example compulsory reference to the International Court of Justice.⁸² The

⁷⁷ Article 60 (1) of the Vienna Convention on the Law of Treaties adopted on 22 May 1969 and opened for signature on 23 May 1969 by the UN Conference on the Law of Treaties. It was entered into force on 27 January 1980 [Hereinafter Vienna Convention]

⁷⁸ Ibid

⁷⁹ Ibid, Article 60 (2)(C)

⁸⁰ *Advisory Opinion in Namibia Case*, ICJ Reports, (1970-71), p 47

⁸¹ *ILC Reports*, note 74 *supra*, p 254

⁸² Ibid

Commission unanimously took the view that termination or suspension should be allowed only in case of serious breaches. Therefore, it tended to restrict the right of abrogation to “material” or “fundamental” breaches.⁸³

The term “material” was preferred to “fundamental” to express the nature of violation to which the right applied, as the latter might be thought to indicate that the violation must be of a provision directly touching the central purposes of the treaty. However, other provisions considered by a party to be essential to the effective performance of the treaty, albeit of a secondary nature, may have been very material in the decision to enter into the treaty at all.⁸⁴

Thus, Paragraph 3 of Article 60 defines the kind of breach which may give rise to a right to terminate or suspend the treaty as: “A material breach for the purpose of this article consists in; (a) a repudiation of the treaty not sanctioned by the present convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”⁸⁵ A repudiation of the treaty other than provided for under any of the present articles would clearly be considered a material breach of the treaty. The second form of material breach, set out in sub-paragraph (b), is a more general one, defined as a violation of a provision essential to the accomplishment of any object or purpose of the treaty.⁸⁶

An example on the difference between the two kinds of breaches is the argument advanced by Russia during the 1998 crisis. In contrast to the view held by the vast majority of the Council Members that Iraq’s non-compliance with the disarmament obligations constituted a material breach of the cease-fire, the Russian Federation’s Representative to the United Nations argued that only a re-invasion of Kuwait by Iraq would constitute “a material breach of the cease-fire

⁸³ Ibid

⁸⁴ Ibid, p 255

⁸⁵ Article 60 (3) of the Vienna Convention

⁸⁶ *ILC Reports*, note 74 *supra*, p 255

resolution” and that Iraq’s refusal to cooperate with inspectors was not a material breach.⁸⁷ This latter argument, however, is groundless, given that the Convention made it clear that terms outside the “central purpose” of the treaty may still be considered “material”.

It should be noted that a breach of a treaty, however serious, does not necessarily and by itself result in termination of the treaty, and also, a State cannot simply allege a violation of the treaty and thereby abrogate it. The expression “invoke as a ground” highlights that the right provided by the article is not a right of arbitrary denunciation.⁸⁸ Moreover, the Commission, realizing the need to have proper safeguards against arbitrary abrogation of the treaty on the ground of an alleged breach, imposed procedural conditions in Article 65, such as a notification period prior to the termination and seeking peaceful settlement to the dispute, as will be discussed below.⁸⁹

C.2 The applicability of Article 60 to armistice agreements

It could be argued that Article 60 does not apply to Armistice Agreements simply because it belongs to and is governed by a quite distinct part of international law. However, this argument would be incorrect. In the discussion over Article 60 of Vienna Convention, questions were raised as to the possibility of suspension or termination in the cases of law-making treaties such as the Genocide Convention and the Geneva Conventions on the treatment of prisoners of war, sick and wounded or special types of treaties such as disarmament treaties (where a breach by one party endangers or renders ineffective the whole regime of the treaty as between all parties). The view of the Commission was that general law-making treaties or special types of treaties should not, *per se*, be treated differently from other multilateral treaties in this respect. This view was based on the idea that it would be inequitable to allow a defaulting State to hold the injured

⁸⁷ Wern, C. “UN Resolutions Allow Attacks on the Likes of Iraq,” *New York Times*, 5 February, 1998, at A5, quoted in Wedgwood, R. “The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq’s Weapons of Mass Destruction”, 92 AJIL, 1998, p 727 at footnotes

⁸⁸ *ILC Reports*, note 74 *supra*, p 254

⁸⁹ Article 65 of the Vienna Convention

party to its obligations under a treaty, whilst itself in breach of its obligations towards that State under the treaty.⁹⁰ Accordingly, although from one perspective, armistice agreements belong to the law of armed conflict and international law of human rights, however, the Commission did not exclude them from the umbrella of Article 60 on the ground that they belong to distinct parts of international law.

Another objection may arise on the basis that UN-sponsored cease-fire cannot be considered as a treaty, but is a decision taken by the Council, and that its original authority comes from a binding resolution adopted by the Council, not by the discretion of the parties. In other words, the parties are under an obligation to obey the decision of the Council, whether they like it or not. However, the Security Council sponsorship or ordering for the armistice does not obliterate its legal status as international agreement concluded between the parties. This view is supported by the ICJ judgment in the *South West Africa* cases.⁹¹ In that case, a similar contention was presented by South Africa in its preliminary objection. South Africa, the mandatory State, contended, inter alia, that the Mandate was not *ab initio* a “treaty or convention”, since its original authority was a resolution of the Council of the League of Nations; “the Council was taking executive action in pursuance of the Covenant and was not entering into an agreement which would itself be a treaty or convention.”⁹² It added that “this view . . . would regard the Council’s Declaration as setting forth a resolution . . . which would, like any other valid resolution of the Council, owe its legal force to the fact of having been duly resolved by the Council in the exercise of powers conferred upon it by the Covenant.”⁹³ The Court rejected this claim arguing that while the Mandate for South West Africa took the form of a resolution, it was obviously of a different character. It

⁹⁰ *ILC Reports*, note 74 *supra*, p 255

⁹¹ *South West Africa* cases (Second Phase), (Preliminary Objections), ICJ Reports, Judgement of 21 December, 1962

⁹² *Ibid*, pp 330-1

⁹³ *Ibid*

could not be regarded as embodying only an executive action in pursuance of the Covenant. In fact and in law it was an international agreement having the character of a treaty or convention.⁹⁴

In short, the Court held that the Mandate was an agreement, irrespective of the confirmation by the Council of the League. The case of a cease-fire agreement sponsored by the Council is exactly of the same position; although the sponsorship by the Security Council, in law, it is still an international agreement governed by the law of treaties.

Based on the above arguments, it is submitted that armistice agreements—as international agreements—are governed by Vienna Convention on the Law of Treaties and that in case of material breach of the terms of the agreement, the other party (or parties) has the right to invoke this violation as a ground to suspend or terminate the cease-fire. At any rate, even if it is accepted that Article 60 of the Vienna Convention does not apply to cease-fire agreements ordered by the Security Council, the Convention stated in the preamble that questions not regulated by its provisions would continue to be governed by the rules of customary international law. Thus, the applicable rule would be the traditional rule of customary international law of warfare, codified in the Hague Regulations.

C.3 Peaceful settlement of disputes and the case of aggressor State

Another objection may be raised against the view presented above on the basis that a party to a cease-fire agreement is under an obligation not to resume fighting and to seek peaceful solution for the violations committed by the defaulting party. Article 43 of the Convention states that “The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the

⁹⁴ Ibid

treaty.”⁹⁵ Since all States are bound by a general obligation to seek peaceful settlement for their disputes—a clear obligation stipulated in Article 2(3) of the Charter as well as the Declaration of Friendly Relations stated in the General Assembly Resolution 2625 (1970)—resuming fighting, as a consequence of the termination of an armistice agreement, is not permitted under this Convention. Further reaffirmation for the principle of peaceful settlement of disputes can be found in Article 65 of the Vienna Convention which referred to methods of dispute settlement set forth in Article 33 of the UN Charter.⁹⁶ Paragraph (3) of Article 65 states that in case of dispute regarding a treaty “parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.” Paragraph (4) also said that “Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.”⁹⁷ These provisions regarding the peaceful settlement of dispute, if taken literally, however, would in many situations paralyze the world community from acting in response to aggression or cease-fire violations. The drafters of the treaty seemed to be aware of such a situation, so they provided Article 75 which stated that “The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.”⁹⁸ The reservation articulated in this article implies that an aggressor State cannot be protected by the provisions of this Convention. Accordingly, in case of an armistice agreement concluded with an

⁹⁵ Article 43 of the Vienna Convention

⁹⁶ Article 33 of the UN Charter states that: (1) “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. (2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.”

⁹⁷ Article 65 of the Vienna Convention, paras. 3 & 4

⁹⁸ Article 75 of the Vienna Convention

aggressor, the other party is not bound by any provision of this Convention which may prejudice his legitimate rights under the UN Charter.

As to the present case, it could be argued that, according to Article 75, the Council allies were not constrained by the provisions of Vienna Convention regarding the termination of the treaty such as the notification period⁹⁹ and the peaceful settlement of dispute obligations. In other words, these provisions cannot be interpreted to mean that the allies were under the obligation not to use force in response to Iraq's material breach of the cease-fire obligations. However, this is not to suggest that the Council allies were absolutely free to resume hostilities before exhausting all possible peaceful solutions for the Iraqi violations to the cease-fire, but, according to Article 75, they could sidestep this obligation, at least under the provisions of the Vienna Convention.

Regarding the general obligation of seeking peaceful settlement under UN Charter, a strong argument can be made that the allies throughout 12 years, from 1991 to march 2003, have already exhausted all possible peaceful measures to bring about Iraq's compliance with its obligations. On the contrary, it may be argued that, in this case, peaceful means for dispute settlement would not be exhausted unless the Security Council determines the failure of the peaceful means. However, as indicated above, the Council Members unanimously viewed Resolution 1441 as the last peaceful measure on the matter; any further defiance by Iraq would be faced by military action.¹⁰⁰ The finding by the UNMOVIC that Iraq was still refusing to cooperate fully with the inspection process left no doubt that peaceful means had been

⁹⁹ Article 65 laid down the procedures for the termination or suspension of the treaty. These procedures include that a notification period, not be less than three months, should be given by the party (or parties) who invoked the breach to the defaulting party before the termination or suspension of the treaty. In the present case, however, an argument can be made to suggest that Resolution 1441 has warned Iraq of a resumption of hostilities as it cautions the Iraq's continued violation of its disarmament obligations will result in "serious consequences"

¹⁰⁰ See note 27 *supra*

exhausted.¹⁰¹ Furthermore, as a factual matter, the US and the UK did not resume hostilities immediately after the resolution, but they allowed a period of more than four months for peaceful disarmament. It was only after the reports of UNMOVIC that the allies decided to resume their military operations.

Conclusion

Examination of the customary rules on armistice agreements shows that customary law permitted a party to an armistice to denounce the agreement and resume fighting if the other party seriously violated the terms of the agreement. The proposal submitted by some scholars suggesting that this rule has been affected by the law of the UN Charter does not stand much scrutiny. Therefore, the customary rule regarding the violation of an armistice agreement remained unchanged and still governs the current international conflicts. This rule is enhanced further by Article 60 of the Vienna Convention on the Law of Treaties, which is also applicable to cease-fire agreements.

As to the present case, Resolution 687 clearly linked the cease-fire between the coalition forces and Iraq to the later “unconditional acceptance” of two vital terms: to eliminate weapons of mass destruction and to allow verification by a Special Commission. This link between the cease-fire and Iraq’s compliance with the terms and conditions of Resolution 687 was confirmed in many Security Council Resolutions and statements by UN officials. The fact of the matter, however, is that Iraq was unremittingly in violation for its disarmament obligations established in Resolution 687. Therefore, a strong argument can be made that the finding that Iraq was in material breach of its obligation under the cease-fire agreement (Resolution 687) gave rise to the right of the coalition forces to suspend or terminate the cease-fire and resume hostilities without new authorization of use of force.

¹⁰¹ See notes 31 & 32 *supra*

Chapter 6

Iraq's Sovereign Rights and the Legality of the Security Council

Sanctions

Introduction

The preceding chapter concluded that, according to the customary rules on armistice agreements and the rules of Vienna Convention on the law of treaties, the finding that Iraq was in material breach of its obligation under the cease-fire agreement (Resolution 687) releases the coalition forces from their obligations under the agreement and permits them to suspend the cease-fire and resume fighting. But were these obligations legal under international law and the law of the UN Charter, in the first place? Iraq, while accepting the terms and conditions of the cease-fire Resolution 687, protested that the sanctions imposed in this resolution were illegal and unfair; describing Resolution 687 as “iniquitous” but accepting it had “no choice but to accept.”¹ In the legal literature, some scholars have expressed concerns about the sovereign rights of Iraq. They questioned the legality of the decisions and proposals stipulated in Resolution 687 and their compatibility with the principles and purposes of the UN Charter, which emphasize on the sovereign rights of States.² This argument, if accepted, leads to the fundamental question whether Iraq had the right to defy these measures or was estopped from protesting the illegality of these measures by its declaration of acceptance.

The first section of this chapter highlights the disputes surrounding the legitimacy of the disarmament measures imposed upon Iraq in Resolution 687, and the legal arguments advanced for these arguments. It also examines the legal foundations for the disarmament regime and the

¹ Iraq formally accepted the terms of the cease-fire in a letter delivered to the Security Council on 6 April 1991. *UN Doc. S/22456* (1991)

² See, for example, Kirgis, F. “The Security Council’s First Fifty Years”, 89 *AJIL*, 1995, p 536

capability of the Security Council to impose such a decision under the UN Charter. The second section investigates Iraq's right to reject or defy the implementation of the disarmament measures that it considers to be unconstitutional under the current regulations of the law of international organizations. The final section focuses on the doctrine of estoppel in international law and its applicability to the present case. It also explores the legal effects of Iraq's notification of acceptance of Resolution 687 and to what extent this representation of fact has estopped it from protesting the legality of the disarmament sanctions.

Section A: The legitimacy of the disarmament obligations imposed upon Iraq

As mentioned in Chapter 4, the disarmament measures imposed upon Iraq in Resolution 687 had little to do with the invasion of Kuwait, since the military hardware specified in that resolution had not been deployed by Iraq during its invasion of Kuwait or during the *Operation Desert Storm*.³ These measures, in fact, go well beyond the original demands for Iraqi withdrawal⁴ and, indeed, beyond any Iraq had assumed in the treaties it signed. By these measures, Iraq was deprived, forever, of a right claimed by all other States unless voluntarily forsaken.⁵ As Iraq's acceptance of the terms of Resolution 687 was necessary for the cessation of hostilities, Iraq resentfully accepted these conditions, while protesting that the sanctions were illegal and unfair.⁶ In fact, the landslide defeat of Iraq in the *Operation Desert Storm* eviscerated it of any power to bargain or to resist these obligations. However, the basic legal question raised by the decisions and proposals imposed upon Iraq in Resolution 687 relating to the sovereign rights of Iraq concerns their compatibility with the principles and purposes of the UN Charter.

As mentioned in Chapter 1, Article 24 (2) imposes an obligation on the Security Council to "act in accordance with the Purposes and Principles of the United Nations" in discharging its duties. Thus, the Charter Principles and the Purposes related to them could be considered as boundaries for the Council's authority in imposing sanctions.⁷ Conversely, a Council's decision that violates these Principles may be considered as legally invalid. Among the basic principles on which the UN Charter is founded are the principles of "sovereign equality" of States and non-interference in matters "essentially within the domestic jurisdiction of any state."⁸ These principles call into

³ See chapter 4, section C.2.2

⁴ Schachter, O. "United Nations Law in the Gulf Conflict", 85 *AJIL*, 1991, p 457

⁵ Johnstone, I. *Aftermath of the Gulf War: An Assessment of UN Action*, International Peace Academy, Lynne Rienner Publishers, London, 1994, p 22

⁶ *UN Doc. S/22456*, note 1 *supra*

⁷ See Chapter 1, section C.1

⁸ Article 2(7) of the UN Charter; see also Chapter 1, section C.1.1

question the legitimacy of disarmament measures imposed on defeated aggressor or on any other State.⁹ In other words, a Council decision to deprive an individual State of the right of possessing some sort of weapons, which are available for other States, can be seen as a violation of the principle of “sovereign equality” of States and interference in a matter essentially within its internal affairs.

A.1 The legal basis for the disarmament mandate

A strong argument, however, can be made in supporting the legitimacy of the disarmament regime imposed by the Council on defeated Iraq. While it is true that no other State has ever been subjected to such a disarmament mandate under Chapter VII, no other state since North Korea in 1950 has committed such an act of aggression against a neighbouring State.¹⁰ Iraq’s aggressive behaviour towards Kuwait and previously against neighbouring Iran, coupled with its revealed propensity to threaten with or use weapons of mass destruction in the future justifies the intrusive measures taken by the Council in an attempt to eliminate Iraq’s war-making powers and, hence, to restore peace and security in the area, even if these measures are unprecedented or go beyond the original demands for Iraqi withdrawal. In addition, little credence should be given to the claim of an aggressor that its sovereign rights are violated by restraints on its military capability.¹¹ Surely, a State that has already been guilty of aggression could reasonably have some limitations imposed on its capability to use force.¹²

From a legal perspective, the disarmament regime imposed upon Iraq was within the scope of the Council’s authority as long as it could be reasonably be said to fall within the broad aim of restoring international peace and security, in accordance with the purposes and principles of the

⁹ See Chapter 1, section C.1.1 for the sanctions imposed by the Council upon the Iranian Nuclear programme

¹⁰ Kirgis, note 2 *supra*, p 536

¹¹ Schachter, note 4 *supra*, p 457

¹² *Ibid*, p 468

Charter.¹³ The Charter includes several articles that empower the Council to make recommendations or to take binding decisions under Chapter VII to maintain and restore international peace and security. Article 41, in particular, authorizes the Council to impose economic and other non-forcible sanctions to enforce UN requirements that extend beyond repelling aggression or ending hostilities. That article provides explicitly for the use of sanctions to enforce Council decisions taken under Chapter VII. Such decisions must of course be compatible with the terms of Article 39 and therefore serve the broad aim of maintaining or restoring peace and security.¹⁴ In Iraq's case, the Council based its decisions in part on the claim that the measures taken would serve to maintain the peace by curtailing the military capabilities of a State that had already perpetrated acts of aggression and could continue to pose a threat to international peace and security. Furthermore, enforcement measures taken under Chapter VII are not subject to the restriction of Article 2(7) against intervention in matters which are essentially within the domestic jurisdiction of any state. The article explicitly states that the general principle of non-interference in internal affairs "shall not prejudice the application of enforcement measures under Chapter VII."¹⁵

With regard to the principle of "sovereign equality" stated in Article 2(1), any disarmament measures imposed after a breach of the peace or act of aggression must be fitted to the context. Thus, such measures would be inconsistent with Article 2(1) only if they were wholly disproportionate both to the threat of renewed conflict and to sanctions taken against other aggressors in similar circumstances.¹⁶ In Iraq's case, having in mind its antagonistic attitude, the disarmament mandate cannot be seen as inappropriate or far-fetched, given that the Council refrained from demanding the complete demilitarization and neutralization of Iraq. The Council

¹³ Johnstone, note 5 *supra*, p 19

¹⁴ See Chapter 1, sections B.1 and B.2

¹⁵ Article 2(7) of the UN Charter

¹⁶ Kirgis, note 2 *supra*, p 535-6

implicitly recognized the right of Iraq to possess military means allowing it to defend itself from external attack; a right guaranteed in Article 51, which remains exercisable, however serious Iraq's past violations have been.¹⁷ The sanctions only aimed at depriving the aggressive regime in Baghdad of the capacity to threaten or commit further aggression in the region, not to render it unable to defend itself. Furthermore, Resolution 687 also recognized Iraq's sovereign rights, as there was no attempt to impose constitutional decisions or to change the Iraqi regime or to remove the Iraqi leader, Saddam Hussein, although the leaders responsible for aggression and war crimes might be subject to prosecution by victim States.¹⁸ Overall, one can argue that the disarmament obligations were balanced with the threats Saddam Hussein's regime posed to security and stability of the Middle East. To fetter the Security Council from employing such a measure on an aggressive State who has already been guilty of aggression would be to rendering it impotent to fulfil its main task of maintaining international peace and security.

Against this sensible and well-founded view, the legitimacy of some particular sanctions has been disputed on grounds that they encroach Iraq's right of self-defence under Article 51 of the UN Charter. It has been argued that if the disarmament sanctions applied only to nuclear, chemical and biological weapons, Iraq would still be able to exercise its right of self-defence. However, limiting its weapons capability to ballistic missiles with a range of no more than 150 kilometres, whilst understandable in light of the proximity of potential Middle East targets and Iraq's use of Scud missiles during the Persian Gulf conflict, could constitute deprivation of legitimate means of self-defence. In the turbulent Middle East, this would mean endangering Iraq's political independence and territorial integrity. This argument might be countered if the prohibition were limited to Scud missiles, or to any others that specifically threatened non-military targets, or to missiles with a particularly destructive type of warhead. In the absence of

¹⁷ Johnstone, note 5 *supra*, p 21-2

¹⁸ Schachter, note 4 *supra*, p 468

any such limitation, however, the prohibition does seem open to objection on Article 51 grounds.¹⁹ This argument, if accepted, would mean that Iraq had the right to reject or defy the implementation of disarmament measures that encroached its right of self-defence under Article 51 of the UN Charter on the grounds that these measures were unconstitutional and, therefore, legally invalid.

Section B: Iraq's right to challenge illegitimate disarmament measures under the law of international organizations

The scepticism surrounding the legitimacy of some elements of the disarmament regime imposed upon Iraq by Resolution 687 leads to the fundamental question of whether Iraq had the right to reject and defy the implementation of measures that undermined its right of self-defence or was estopped from doing so by its declaration of acceptance. In order to answer this question, the first part of this section will investigate the rules and principles of the law of international organizations regarding *ultra vires* decisions adopted by international organizations and the right of member States to reject them. The following part explores the doctrine of estoppel in international law and its applicability to the present case.

B.1 The legal validity of ultra vires decisions

The issue of the legal validity of acts and decisions adopted in excess of the authority of those concerned has long occupied international lawyers, as well as international courts and tribunals.²⁰

The importance of the issue is increased by persistent procedural irregularities and the tendency

¹⁹ Kirgis, note 2 *supra*, p 536

²⁰ See Lauterpacht, H. "The Legal Effect of Illegal Acts of International Organization", in *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, Stevens, London, 1965, p 88; Pollux, "The Interpretation of the Charter", 23 *BYIL*, 1946, p 54 Osieke, E. "Ultra Vires Acts in International Organizations: The Experience of the International Labour Organization" 48 *BYIL*, 1976-1977, p 159; Osieke, E. "Unconstitutional Acts in International Organizations: The Law and Practice of the International Aviation Organization, 28 *ICLQ*, 1979, p 1; Morgenstern, "Legality in International Organizations", 48 *BYIL*, 1976-1977, p 24; Osieke, E. "The Legal Validity of Ultra Vires Decisions of International Organizations", 77 *AJIL*, 1983, p 239; Weston, J. "Auto-interpretation, Competence, and the Continuing Validity of Article 2 (7) of the Charter", 71 *AJIL*, 1977, p 60

of some international bodies to act in ways not expressly provided for in their constitutive instruments, claiming that such measures are essential for the effective fulfilment of their responsibilities and duties. This issue necessarily involves two key questions: (i) whether member States of an international organization have the right to challenge unconstitutional decisions adopted in excess of the authorities vested on the organization and (ii) whether the international body itself is competent to rule on such challenges.

B.1.1 The member States' right to challenge ultra vires

The UN Charter, like constitutions of most international organizations, does not explicitly provide for challenge to the acts and decisions of its organs, on grounds of excess of authority or procedural irregularity, or for the competence of its bodies to rule on such challenges. In the absence of such provisions, some writers argue that unconstitutional acts and decisions of international organizations, i.e. those clearly exceeding the scope of their functions and powers, or grounded on irrelevant political considerations, are *ultra vires* and, hence, member States are entitled to reject them.²¹ Such a right, in the absence of a judicial machinery to review acts of international organizations, does not rest on a prior judicial determination or finding of nullity by a competent tribunal. In other words, the nullity of an *ultra vires* act can be determined solely by the Member State concerned.²²

The right of member states to reject decisions they consider unconstitutional in the absence of a legal determination by a review body to that effect has been premised on two legal grounds. First is the consensual nature of the constitution concerned. Because the constitutive instruments are

²¹ Osieke, "The Legal Validity of Ultra Vires Decisions of International Organizations", *ibid*, p 240-1

²² In the *Certain Expenses* case, the President of the Court, Judge Winiarski, in his dissenting opinion supported this view arguing that in the international legal system where there is no tribunal competent to make a finding of nullity, "it is the state which regards itself as the injured party which itself rejects a legal instrument vitiated, in its opinion, by such defects as to render it a nullity." In his opinion that this is "the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid." Dissenting Opinion of Judge Winiarski, *Certain Expenses* case, ICJ Reports, 1962, p 232

in fact international treaties, each party possesses an inherent right to supervise their implementation to ensure that the organizations do not adopt decisions that would be incompatible with their objects and purposes, or that would be detrimental to the interests of the member States in excess of what they had accepted as the basis for membership.²³ Second, it has been argued that this right is derived from the member States inherent right to interpret the law if they are not satisfied with the interpretation given by an international organ. States can assert the correctness of their own interpretation of the constitutions of international organizations is the correct one, and in consequence refuse to comply with decisions of the international bodies that they claim to be unconstitutional.²⁴

There have been instances in international practice, where member States rejected decisions they considered to be unconstitutional, and some Judges of the ICJ have accepted their right to do so. For example, Judge Bustamante in his Dissenting Opinion in the *Certain Expenses* case: "When, in the opinion of one of the Member States, a mistake of interpretation has been made or there has even been an infringement of the Charter, there is a right to challenge the resolution in which the error has been noted for the purpose of determining whether or not it departed from the Charter."²⁵ Similarly, in the case of the *Interpretation of the Agreement between the WHO and Egypt*, Judge Gros, in his separate opinion, stated that "member States are not bound to implement an unlawful act if that is what they hold it to be, and the practice of international organizations has shown that recourse is had in such circumstances to a refusal to carry out such act."²⁶ According to this view, it could be argued that Iraq had the right to defy some of the

²³ Osieke, "The Legal Validity of Ultra Vires Decisions of International Organizations", note 20 *supra*, p 240

²⁴ Waston, note 20 *supra*, p 60

²⁵ Dissenting Opinion of Judge Bustamante, *Certain Expenses* case, ICJ Reports, 1962, p 304

²⁶ Separate Opinion of Judge Gros, *Interpretation of the Agreement between the WHO and Egypt* case, ICJ Reports, 1980, p 104

disarmament measures imposed on it by Resolution 687, should it find that these measures impinged its inherent right of self-defence.

B.1.2 The competence of the international organization to rule on the challenge

On the other side of the issue, it has been suggested that international bodies have no competence to rule on such challenges by a member State and that for them to do so would be to act as “judges in their own cases,” contrary to the general legal principle.²⁷ In his dissenting opinion in the *Namibia* case (1971), Judge Sir Gerald Fitzmaurice put the issue thus: “In the institutional field, the justification for the act of some organ or body may turn upon considerations of a political or technical character, or of professional conduct or discipline, and if so, the political, technical or professional organ or body concerned will, in principle, be competent to make the necessary determinations. But where the matter turns, and turns exclusively, on considerations of a legal character, a political organ, even if it is competent to take any resulting action, is not itself competent to make the necessary legal determinations on which the justification for such action must rest. This can only be done by legal organ competent to make such determinations.”²⁸

B.1.3 The accepted rules under the law of international organizations

The proposals mentioned above have not been generally accepted. The generally held view, supported by pronouncements of the International Court of Justice and the consistent practice of the organs of international organizations is that international bodies are competent to deal with claims against their jurisdiction. The ICJ repeatedly confirmed this view in its jurisprudence. For example, in its Advisory Opinion in the *Certain Expenses* case (1962), the Court stated that “In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the

²⁷ Osieke, “The Legal Validity of Ultra Vires Decisions of International Organizations”, note 20 *supra*, p 241

²⁸ Dissenting Opinion of Judge Gerald Fitzmaurice, *Namibia* case, ICJ Reports, 1971, p 299

United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.”²⁹ The Court went further to state that “when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.”³⁰ In a more explanatory way, Judge Morelli, in his separate opinion in the same case, wrote, “It is not possible to suppose that the Charter leaves it open to any State Member to claim at any time that an Assembly resolution authorizing a particular expense has never had any legal effect whatever, on the ground that the resolution is based on a wrong interpretation of the Charter or an incorrect ascertainment of situations of fact or of law. It must on the contrary be supposed that the Charter confers finality on the Assembly’s resolution irrespective of the reasons, whether they are correct or not, on which the resolution is based; and this must be so even in a field in which the Assembly does not have true discretionary power.”³¹

Indeed, in practice, to give individual member States the right to interpret the UN Charter unilaterally would lead to numerous different, and maybe contradictory, views which eventually would result in a hopeless incapacity of the bodies of the United Nations to function and to

²⁹ *Certain Expenses* case, ICJ Reports, 1962, p 168

³⁰ Ibid. Similarly, when the Court considered the objection raised in the *Namibia* case that General Assembly Resolution 2145 (XXI) made pronouncements that the Assembly, not being a judicial organ and not having previously referred the matter to any such organ, was not competent to make, the Court stated: “To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking” The Court concluded, therefore, that it was “unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own case.” *Namibia case*, ICJ Reports, 1971, p 49

³¹ Separate opinion of Judge Morelli, *Certain Expenses* case, ICJ Reports, 1962, p 224

discharge their duties.³² Furthermore, to confer upon States the right to decide for themselves the legal validity of the decision, and subsequently, to reject decisions that they consider unconstitutional without a legal determination by a review body to that effect is, actually, to give them unfettered right to reject any inconvenient obligation.³³ In the case of the Security Council, where matters are related to international peace and security, this proposal may result in dangerous situations. Finally, to allow member States in general to reject a properly adopted decision on the basis of a unilateral determination as to its constitutionality would be tantamount to making the members judges in their own cases, contrary to the general principles of law.³⁴

While admitting that, in the absence of a review body, it is indispensable that determinations on the legality of decisions claimed to be unconstitutional must be left to the organization itself, these determinations, however, seem unsatisfactory as legal decisions because the organization will be judging its own jurisdiction, contrary to the general principles of law. Perhaps, this is particularly the case with respect to the Security Council, as a corollary of the unique structure of that body. The Council is dominated by a few powerful States who can effectively influence its decisions. In addition, the veto power granted to the permanent members means that the Council cannot take any decision against the will of any of those members. These factors render the Council less able to carry out such determination of a judicial nature. Moreover, if it did so, such determination, certainly, would not satisfy the States who challenged the legality of the original decision, especially, if that decision seriously affected them. There would always be claims of prejudice and bias towards the views of powerful States. Indeed, political realities suggest that such determination will, in fact be made, or at least must be approved, by those members. For instance, if the majority of Council members recognized that the disputed decision was indeed

³² Wright, Q. *The Strengthening of International Law*, 98 Recueil des cours, 1959, p 125

³³ Pollux, note 20 *supra*, p 56

³⁴ Osieke, "The Legal Validity of Ultra Vires Decisions of International Organizations", note 20 *supra*, p 255

ultra vires or inconsistent with the principles and purposes of the Charter, any alteration or modification of that decision can only be made at the approval of all permanent members. However, if such action aggrieves the interest of one of permanent members or their allies, the Council most likely will be blocked from making such pronouncement.

As to the present case, according to the general and settled view, Iraq has no right to reject any of the disarmament measures imposed on it in Resolution 687 even if they are unconstitutional or *ultra vires*. These measures will remain enforceable upon Iraq unless lifted or modified by the Security Council itself. The Council, however, did not make any determination on Iraq's claim that the sanctions were illegal and unfair. It is also highly unlikely that the Council was willing or able to reconsider these measures. In fact, the original decision to call for the destruction of all Iraq's missiles "with a range greater than 150 kilometers" came as a result of a request from the Israeli government to the US officials.³⁵ During the debate in the Security Council, Russia wanted to confine the sanction to missiles with a range over 300 kilometers, whereas the US favoured 120 kilometers, but eventually compromised on 150 kilometers, short enough to keep Israel out of range.³⁶ This implies that the US would, almost certainly, veto any resolution that extended this limit.

Section C: The doctrine of estoppel and its applicability for the present case

Apart from the controversies concerning the legal validity of *ultra vires* decisions and the lawfulness of the principle of *competence de la competence*, Iraq was, in fact, precluded from protesting or defying the implementation of measures that appear to be inconsistent with the principles of the UN Charter by another operational rule of international law, namely, the doctrine of estoppel. According to that doctrine, Iraq was estopped from protesting the illegality

³⁵ "Gulf Victors Pushing New Terms for End to War", Christian Science Monitor (19 March, 1991), p 3, quoted in Johnstone, note 5 *supra*, p 68

³⁶ Johnstone, *ibid*, p 16

of these measures by its declaration of acceptance. Before explanation of this proposal, the following two parts will briefly review the doctrine of estoppel, its purpose, forms, and scope of application.

C.1 The doctrine of estoppel in international law

The doctrine of estoppel is on the face of it a private law doctrine forming a part of the law of evidence.³⁷ Its basic purpose is to prevent a party from benefiting by his own inconsistency at the expense of another party who has in good faith relied upon a representation of fact made by the former party.³⁸ While admitting that estoppel can be described “as a rule of evidence” the Board in the *Privy Council in Canada and Dominion Sugar Company, Limited v. Canadian National (West Indies) Steamships, Limited* pointed out that “the whole concept [of estoppel] is more correctly viewed as a substantive rule of law.”³⁹ The principle of estoppel is an important operational rule in international law, widely held among jurists as a general principle of international law. International tribunals have frequently referred to estoppel, preclusion or equivalent terms.⁴⁰

The principle of estoppel is based on the expectation that a State should be consistent in its attitude to a given factual or legal situation, an expectation originating in the continuing need for

³⁷ Lauterpacht, H. *Private Law Sources and Analogies of International Law*, Archon Books, London, 1970, p 203

³⁸ Bowett, D. “Estoppel before International Tribunals and its Relation to acquiescence”, 33 *BYIL*, 1957, p 177. The classic formulation of estoppel in English Law, as defined by Lord Denman, is that “where one by his word or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.” Lord Denman, C.J., in *Pickard v. Sears*, 1837, 6 Ad and E. p. 474

³⁹ The case of *Canada and Dominion Sugar Company, Limited v. Canadian National (West Indies) Steamships, Limited*, 1947, A.C. p 56

⁴⁰ In his Separate Opinion in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, *Merits*, Vice President Judge Alfaro said that “there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence, according to which ‘a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation.’ This principle is designated by a number of different terms, of which “estoppel” and “preclusion” are the most common. But it is also clear that these terms are not to be understood in quite the same sense as they are in municipal law . . . that this principle can operate with decisive effect in international litigation.” Separate Opinion of Judge Alfaro, *Case concerning the Temple of Preah Vihear*, ICJ Reports, 1962, p. 39

a degree of stability and predictability in States' behaviour. A State's inconsistency in its international relations would be viewed unfavourably both by other States and, in the event of dispute, by any international tribunal called upon to adjudicate.⁴¹ The jurisprudence of international tribunals, in many cases, asserted the need for constancy and predictability in States' behaviour and, to this effect, States are to be bound by their declarations and barred from acting contrary to their representations of fact, even if these declarations in fact do not correspond to their real intention.⁴² An example is the classical *Eastern Greenland* case, where Denmark claimed that, because in various bilateral and multilateral treaties, to which Norway was a party, Greenland was described as a Danish colony or as a part of Denmark, or Denmark was allowed to exclude Greenland from the operation of the agreement, Norway was therefore precluded from contesting Danish sovereignty over Greenland.⁴³ Denmark also relied on a statement by M. Ihlen, the Norwegian Minister of Foreign Affairs, to the Danish Minister of Foreign Affairs, declaring that "the plans of the Royal Danish Government respecting Danish sovereignty over the whole of Greenland...would meet with no difficulty on the part of Norway."⁴⁴ The Court stated, "A careful examination of the words used and of the circumstances in which they were used, as well as of the subsequent developments, shows that M. Ihlen cannot have meant to be giving there and then a definitive recognition of Danish sovereignty over Greenland, and shows also that he cannot have been understood by the Danish Government at the time as having done so."⁴⁵ Therefore, it held Norway to be bound by the ministerial declaration, so that subsequent actions by Norway to occupy parts of Greenland were rendered

⁴¹ MacGibbon, I. "Estoppel in International Law", 7 *ICLQ*, 1958, p 468-9

⁴² Bowett, note 38 *supra*, p 183-4

⁴³ *Ibid*, p 182

⁴⁴ *The Legal Status of Eastern Greenland* case, PCIJ, 1933, A/B, No. 53

⁴⁵ *Ibid*, p 69

“unlawful and invalid.”⁴⁶ This case illustrates that estoppel, if it exists, may suffice to settle the issue because of its unambiguous characterization of the situation, resting on good faith and the principle of consistency in State relations.

Some scholars went further to emphasize the existence of a rule of anti- inconsistency in international law independently from the principle of estoppel,⁴⁷ whereby States are to be bound by their representation of fact or unilateral declarations— not outcome of negotiations, whether or not the result of inconsistency would be to prejudice another party.⁴⁸ However, the existence of such a principle, independently from the principle of estoppel, is controversial.

⁴⁶ Ibid, p 70-1

⁴⁷ This principle has been labelled by different names such as the principle of “contradiction”, “consistency” or “anti-consistency”. The usually cited difference between estoppel and the rule of consistency is that the latter does not require the existence of ‘reliance’ by one party on the representation made by the other. Cheng, for example, argued that “Unlike [estoppel], an admission does not peremptorily preclude a party from averring the truth. It has rather the effect of an argumentum *ad hominem*, which is directed at a person’s sense of consistency, or what in logic is paradoxically called the “principle of contradiction.” See Cheng, B. *General Principles of Law*, Cambridge University Press, Cambridge, 1953, p 147; Similarly, Lord McNair distinguished the principle of consistency from estoppel and admitted that international jurisprudence has accorded some recognition to the former. He argued that it has been “demonstrated that some advantage is to be gained by one State, party to a dispute, by convicting the other State of inconsistency with an attitude previously adopted....This is not estoppel *eo nomine*, but it shows that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est*.” McNair, “The Legality of the Occupation of Ruhr”, 5 *BYIL*, 1924, p 35. In the case concerning the *Temple at Preah Vihear*, Judge Alfaro asserted the existence of an “anti-inconsistency” principle in international law that requires a State to hold to its view of fact or law, even where there is no reliance by another State. He distinguished this rule from the doctrine of estoppel; suggesting that the rule against inconsistency applied in international cases is based primarily on good faith, secondly on analogy to the municipal law of contract, and thirdly on analogy to ‘prescription’ and a supposed public policy of avoiding controversies. However, Judge Alfaro was the only member of the ICJ to hold such a view. The *Temple at Preah Vihear* case, ICJ Reports, 1962, p 42

⁴⁸ It has been suggested that States are to be constrained by their unilateral declarations, albeit not directed towards the formation of agreement. That is, when a State unilaterally—not outcome of negotiations—publish its intention to perform a specific conduct or to take a particular course of action, this notified intent is binding and it is blocked from acting contrary to its declared intention. See generally, Rubin, A. “The International Legal Effects of Unilateral Declarations”, 71 *AJIL*, 1977. Support for this argument was found in the ICJ judgement in *Nuclear Tests* case (Australia v. France). In that case, the ICJ held that France was legally bound by public declarations, made on behalf of the French government, that it would end the conduct of atmospheric nuclear tests. Therefore, the Court found that the “claim advanced by Australia no longer has any object.” Because France could not act against its notified intention and resume its nuclear tests or assert its right to do so in the South Pacific Ocean. *Nuclear Tests* cases (Australia v. France), ICJ Reports, 1974, p 267-71

C.2 Forms and applications of estoppel

The doctrine of estoppel has a wide range of forms and applications. Estoppel can be created by undertakings by a State evidenced in a written form (treaty, memorandum of understanding, compromise, exchange of notes, etc.) Estoppel can also be created by conduct, whether through express representation of fact, or through conduct which can reasonably be construed to imply the existence of a certain state of fact.⁴⁹ This is the most frequent form of estoppel referred to in international jurisprudence and it is known as “equitable estoppel.” The concept of equitable estoppel does not encompass the entire range of ideas conveyed by the doctrine of estoppel itself.⁵⁰ In equitable estoppel, assuming a statement made by a party leads to that party gaining some benefit, or induces a party relying on that statement to act to its own detriment; the principle of good faith requires the party making the statement to stand by it, irrespective whether or not it is true.⁵¹ Estoppel, thus, can be viewed as resting upon responsibility incurred by the party making the statement for having created an appearance of fact, or as a necessary assumption of the risk to another party acting upon the statement on good faith.⁵² Thus, the vital element to create an equitable estoppel in international law is the existence of reliance in good faith upon statements or conduct of the other party, either to the detriment of the party so relying on the statement or to the advantage of the party making the statement. The advantage to the one party or detriment to the other is the consideration which binds the parties; therefore, it must be

⁴⁹ Bowett, note 38 *supra*, p 183

⁵⁰ Rubin, A. “The International Legal Effects of Unilateral Declarations”, 71 *AJIL*, 1977, p 18

⁵¹ The American Commissioner in his Conclusions in the *Santa Isabel* Claims explained the idea of equitable estoppel in international law as “the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.” The USA, on Behalf of Cornelia J. Pringle and Sidney J. Pringle, Administrator of the Estate of Charles A. Pringle Deceased v. The United Mexican States”, in 26 *AJIL*, 1932, p 196 [Hereinafter USA v. Mexico]

⁵² Bowett, note 38 *supra*, p 184

clearly shown to exist.⁵³ In the 1969 ICJ Judgment in the *North Sea Continental Shelf* case, the Court declared explicitly that in international law, the condition of detrimental reliance must be fulfilled before a declaration would be held binding on a declaring State under the estoppel doctrine.⁵⁴ In addition to the element of 'reliance', in his earlier observations on the essentials of estoppel, Professor Bowett argued that the statement or representation of fact must be voluntary, unconditional, and authorized.⁵⁵ This element, however, is not conclusive and was not upheld by the most other scholars or by the ICJ.⁵⁶

C.3 Equitable estoppel in the case of Iraq

When the government of Iraq accepted the cease-fire Resolution 687, it thereby clearly and unambiguously accepted all the terms and conditions of that resolution, including the measures which are contested as illegitimate and committed itself to the obligations imposed in it. Besides the acceptance of Resolution 687 *per se*, Iraq also accepted the mandate of the Commission. Through an exchange of letters in May 1991, the UN Secretary-General, the UNSCOM Executive Chairman, and the Iraqi Foreign Minister agreed on the modalities for the

⁵³ Ibid, p 193

⁵⁴ The Court stated that "having regard to these considerations of principle, it appears that only the existence of a situation of estoppel could suffice to lend substance to this contention—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which is not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice." ICJ Reports, 1969, p 26. para. 30. A Similar view was expressed by Sir Gerald Fitzmaurice, in his concurring opinion *in the Case Concerning the Temple at Preah Vihear*. He stated that "the essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have 'relied upon' the statements or conduct of the other party, either to its own detriment or to the other party's advantage. The often invoked necessity for a consequent "change of position" on the part of the party invoking preclusion or estoppel is implied in this." ICJ Reports, 1962, p 63. Although, in neither case the Court mentioned the form of estoppel it referred to, both situations were understood to be equitable estoppel.

⁵⁵ Bowett, note 38 *supra*, p 190-2

⁵⁶ See section C.4 below

commission's inspections. Those modalities included unrestricted freedom of movement without advance notice to the Iraqi government.⁵⁷

The notification of acceptance for Resolution 687 has certain legal effects. By this notification Iraq published its intention to comply with the terms and conditions of the resolution. Accordingly, Iraq was bound by its declared intention, even if its real intention at the time of acceptance was not to correspond to these obligations or some of them. Iraq was expected to be consistent in its attitude to that representation of fact and to carry out its obligations under that declaration in good faith and constant manner and without laying down conditions for cooperation with the inspection process. However, in fact, Iraq never carried out its obligations without constant political, diplomatic and sometimes military pressure;⁵⁸ this attitude itself violates the rules of good faith and consistency.

By its notification of acceptance, Iraq gained the advantage that the coalition forces halted their offensive military operation and the hostilities have been ceased. On the other hand, the coalition forces had clearly relied upon the statements of fact made by the Iraqi government—its notification of acceptance for Resolution 687—to terminate their military operations. Ergo, the Iraqi acceptance resulted in a 'change of position' of the coalition forces from war to peace and allowed the defeated Iraq to secure advantages by ceasing the hostilities. A similar proposition was held by the Hague Tribunal in the *Russian Indemnity* case. The Tribunal noted that Turkey had obtained value for its agreement on indemnity by the cessation of hostilities.⁵⁹ Equally, the advantage Iraq obtained by the cease-fire and the consequent change in the position of the coalition forces had binding effect upon the parties; this means that in order to maintain good

⁵⁷ For a summary of UNSCOM's rights and duties, see Plan for the Implementation of Relevant Parts of Section C of Security Council Resolution 687, Report of the Secretary-General, *UN Doc. S/22614* (1991)

⁵⁸ See Chapter 4, section C.4.1

⁵⁹ Scott, J. *The Hague Court Reports*, Carnegie Endowment for International Peace, Oxford University Press, London, 1916, p 319

faith, Iraq must stand by its representation of fact and it was estopped from contesting the legality of the measures or obstructing the implementation of the terms of Resolution 687, even those measures that appear to be inconsistent with the principles of the UN Charter. In other words, by its statements of fact and the reliance of the other party in good faith upon such statements, thereby changing its position, Iraq waived its right to possess ballistic missiles with a range more than 150 Kilometers; a right which might perhaps have otherwise existed.

C.4 The voluntary character and treaties imposed on defeated belligerent

As mentioned above, Bowett argued that to create an estoppel, the representation concerned must be made voluntarily by the party against which the estoppel is pleaded.⁶⁰ Hence, representation made under coercion or involving fraud of any material kind will render an estoppel plea invalid.⁶¹ In the *Cuculla* case of 1868, when it was put to the Tribunal that the constitutional government of Mexico had accepted responsibility for the acts of the rebel Zuloaga Government by the treaty of Puebla with Great Britain, the Tribunal said: “But these concessions, extorted by a duress as actual and relentless as ever pressed upon an embarrassed and exhausted government, were made to buy its peace and, rejected by its powerful adversaries, can not now furnish any assistance to this commission in determining the interesting question presented in this case.”⁶²

On this basis, it could be argued that the condition of voluntariness is absent in the present case. The Iraqi concessions were extorted by a sort of duress. In other words, after its landslide defeat, Iraq’s government was exhausted; the acceptance of Resolution’s 687 obligations was made to

⁶⁰ Bowett, note 38 *supra*, p 190-2

⁶¹ Ibid, p190

⁶² Moore, J. B. *International Arbitrations*, vol. 3, p 2879; quoted in *ibid*. A situation similar, though not identical to the one created by fraud or duress, arises when the conduct of one party is not “voluntary” in the sense that the party is not in a position to act otherwise; again, the plea of estoppel would be nullified. In the *Serbian Loans* case, one of the reasons given by the Permanent Court for not holding the bondholders as estopped from claiming payment under the original terms of the debt was the fact that they had been unable to act otherwise than to accept the Serbian payment of French francs. The Permanent Courts said “it does not even appear that the bondholders could have effectively asserted their rights earlier than they did, much less that there is any ground for concluding that they deliberately surrendered them” *PCIJ*, 1929, Series A, No. 20/21, p 39

buy its peace and it had no alternative but to do so. Indeed, Iraq's acquiescence in the disarmament obligations and the other sanctions was not voluntary, at any rate. The obvious implication is that the plea of estoppel is nullified and, consequently, Iraq was not estopped from protesting the illegality of these measures and it had the right to challenge the implementation of these sanctions.

This proposition, however, would render all obligations and conditions included in any armistices imposed upon the vanquished after a war null and void. This would lead to an illogical and impractical position, whereby a defeated aggressor could agree to obligations imposed upon it, confident that it could protest the illegality of these conditions or challenge their implementation soon after. Consequently, this would lead to parties benefiting from their own inconsistency. It is suggested, therefore, that the voluntary character of the representation, if it existed as an essential element to the doctrine of estoppel, should not apply in this situation. A defeated aggressor cannot have it both ways; to avail itself of the advantages of the cease-fire and repudiate the agreement when the performance of its terms becomes onerous. Bowett, indeed, was aware of the dangers inherent in such situations and alluded to the possible exemption of treaties imposed upon the vanquished after a war, from the 'voluntariness' condition; when he discussed this condition, he said, "leaving aside the question of treaties imposed upon the vanquished after a war"⁶³

Furthermore, the *Russian Indemnity* case illustrates the applicability of the doctrine of estoppel to that kind of treaty. The Treaty of Constantinople concluded on 8 February, 1879, between Russia and Turkey, which ended the war of 1877-78 between those two countries, contained conditions imposed upon the defeated Turkey after the war. One of those conditions was stipulated in Article 5 of this treaty, which stated that "the claims of Russian subjects and institutions in

⁶³ Bowett, note 38 *supra*, p 190

Turkey for indemnity on account of damages sustained during the war shall be paid as soon as they are examined by the Russian Embassy at Constantinople and transmitted to the Sublime Porte.”⁶⁴ Consequently, Turkey was held liable for compensation for the damages inflicted by Turkey on Russian subjects and institutions in Turkey during the war. The Hague Tribunal did not dismiss the dispute that arose during the implementation of this condition on the basis that the obligation was not undertaken voluntarily by Turkey. Instead it held that “Turkey had obtained value for its pretended gift by the fact that hostilities have ceased. It is, therefore, not possible to admit the existence of an act of generosity, and still less of a gift.”⁶⁵ Thus, the Tribunal admitted that the compensation was not an entirely voluntarily act on the part of Turkey. This case shows that the mere fact that the conditions of a peace treaty were forced upon the defeated does not nullify the operation of the doctrine of estoppel.

Conclusion

The cease-fire terms applied to Iraq are unprecedented in UN practice and world history; they demonstrate the extent to which the Security Council, acting under Chapter VII, may intervene in matters traditionally within the exclusive province of national sovereignty. Its ability to do so reflected an unusual degree of agreement within the international community as to the threat posed by Iraq, as well as the outcome of an annihilating military defeat which left Iraq in no position to bargain or resist. From a legal point of view, the Charter has vested the Security Council with wide range of authorities in order to execute the responsibility of maintaining international peace and security. It is certainly within the scope of the Council’s authority to impose sanctions such as a disarmament regime on the defeated aggressor as long as they can be reasonably be said to fall within the broad aim of restoring international peace and security, in

⁶⁴ Scott, note 59 *supra*, p 297

⁶⁵ Ibid, p 319

accordance with the purposes and principles of the Charter. Indeed, a State with a long history of aggression and a revealed propensity to continue such an attitude in the future could reasonably have some limitations imposed on its capability to use force, in order to modify its behaviour. While it is admitted that the Council is empowered by the Charter such a measure, it is also undisputed that Iraq's right of self-defence guaranteed in Article 51 remains exercisable however serious Iraq's past violations have been.

On the grounds of Article 51, concerns have been articulated regarding the legitimacy of some measures imposed by Resolution 687 that appear to encroach Iraq's inherent right of self-defence and render it powerless to defend itself in case of external attack. From this perspective, these measures seem to be contrary to the Charter Principles and therefore legally invalid. Accordingly, the pivotal question arose whether Iraq had the right to reject and defy the implementation of these decisions. Examination of the contemporary rules of international law leads to the definite conclusion that, under current regulations, Iraq has no right to reject disarmament measures even if they were unconstitutional or *ultra vires*. These measures remain enforceable upon Iraq unless lifted or modified by the Security Council itself. The Council, however, did not decide on claims raised by Iraq regarding the illegality of the disarmament measures. Even, apart from the law of international organizations, Iraq was actually estopped from protesting the illegality of those decisions or defying their implementation by the operational rule of equitable estoppel. Thus, while the legality of some disarmament obligations stipulated in Resolution 687 were and remain doubtful, Iraq was legally bound by them.

Chapter 7

The Right of Self-Defence against Iraq's Threats

Introduction

The second legal ground for the use of force against Iraq in 2003 was the right of self-defence under Article 51. The US claimed that it had the right of self-defence in pre-emptive action against twofold threats from Iraq: (i) the threats of Iraqi links with terrorism: the war on Iraq was justified as a part of the global war against terrorism, proclaimed by President George W. Bush in response to the 9/11 attacks; (ii) the threats likely to emerge in the future as a result of Iraq's possession of weapons of mass destruction.¹

In fact, the events of 9/11 and its aftermath had a substantial influence on the situation on Iraq, to the extent, that it could be argued that if the 9/11 attacks on the US had not occurred, the invasion of Iraq in 2003 would not have taken place. These attacks influenced the situation on Iraq in two ways: first, the classical right of self-defence was expanded to comprise a new right that permits States to use force against non-State actors (terrorists) and States that support and harbour them; second, its impact on the American policy on the use of force, in particular, the adoption of the doctrine of "preventive self-defence", which has come to be known as the "Bush Doctrine." This chapter examines the significant changes and alteration of the traditional right of self-defence brought about by the events of 9/11 and its aftermath and how far the use of force against Iraq in 2003 could be justified as a defensive war in the light of the developments. The chapter is divided into four sections, as follows:

(A) The first examines the "law of terrorism" in the period prior to the events of 9/11 including the regulations stated by the ICJ in the *Nicaragua* case for the use of force against 'private' use

¹ *President Bush Address to the Nation on Iraq*, 39 Weekly Comp. Press. Doc. 338-39; see section D below

of force. It also examines State practice regarding the use of force against terrorism before the 9/11 attacks.

(B) The second section focuses on the events of 9/11 and their implications, including the reaction of the international community and whether the massive support for the US can be seen as amounting to a new customary rule regarding terrorism. It also examines the new 'legislation' on terrorism enacted by the Security Council in response to the attacks and its effect on the previous legal framework. The section highlights the legal debate over the condition on necessity in relation to the use of force in response to past terrorist attacks. Finally the section examines the State practice in the post-9/11 period including the war on Afghanistan (2001), the Israeli attack on Syria (2003) and the war between Israel and Hezbollah (2006)

(C) The third section analyses the 'Bush Doctrine' of preemptive self-defence which constitutes the legal base for the American claim of self-defence in its invasion of Iraq. This section also examines the State practice regarding anticipatory self-defence

(D) The final section, in light of the conclusions reached in the preceding sections and the facts prevailing at the time of invasion, investigates how far the invasion of Iraq in 2003 can be justified as a defensive war: whether as a part of the global war against terrorism or as an preemptive action against threats of WMDs.

Section A: The use of force against terrorism before 9/11

International terrorism is a relatively new phenomenon, which did not exist at the time of adoption of the United Nations Charter. Therefore, the UN Charter does not use the term “terrorism”. The drafters of the UN Charter did not fully anticipate the existence, tenacity and technology of modern day terrorism. In turn, the right of States to take forcible measures or pre-emptive actions against terrorist networks or States that harbour these organisations was not fully recognized by the UN Charter at that time. Furthermore, the language of Article 2(4) is vague in the area of response to terrorism, in the sense that it is unclear whether or not 2(4) can be deemed to be a prohibition on the behaviour of non-State actors such as terrorists.² Generally speaking, international law contains no specific category of “law of terrorism” and so terrorism issues have to be addressed through the applicable areas of public international law, such as the right of self-defence, State responsibility and the notion of armed attack.³ Basically, the debate here concerns military action taken by individual States, without the consent of the territorial sovereign, in order to eliminate sources of terrorism.

A.1 The “Law of terrorism” before 9/11

As mentioned in Chapter 1, the term “armed attack” represents the key notion of the concept of self-defence pursuant to the exact words of Article 51. Its interpretation decides how far unilateral force is still admissible.⁴ Hence, it goes without saying that a far-reaching consensus on the meaning of this notion is of the utmost significance for the effectiveness of the rules of international law on use of force. In the context of terrorism, clearly, the basis for the right of armed intervention is the characterization of a terrorist attack as an “armed attack,” within the meaning of Article 51 of the Charter, as the necessary prerequisite of the right to take forcible

² Arend, A. and Beck, R. *International Law and the Use of Force*, Routledge, London, 1993, p145-6

³ Brownlie, I. *Principles of Public International Law*, Oxford University Press, sixth edition, 2003, p 713

⁴ See Chapter 1, section E.2

action in self-defence.⁵ However, the nature of terrorism is such that such action cannot be taken directly against the terrorists themselves, in the way that a State could respond to a conventional military attack. Nevertheless, the theory in support of the use of force against terrorism is meaningless without a target. Clearly, one cannot target suicide bombers or aircraft saboteurs, as the former are destroyed along with their victims, and the latter unknown. The focus of attention therefore turns to the origins of the terrorism, the so-called State-sponsor.⁶ Terror groups start their attacks from the territory of a sovereign State. Consequently, that State can be held responsible for the relevant actions. Thus, to satisfy the armed attack requirement in case of terrorism, the State against which force is used in self-defence must have borne responsibility in respect of the attack.⁷

Participation in the use of force by military organized unofficial groups is understood to be encompassed in the prohibition of the use of force.⁸ The Definition of Aggression, in Article 3(g), includes certain forms of assistance to the private use of force.⁹ Likewise, the ICJ, in the *Nicaragua Judgment*, referred to Article 3(g) as being a case of an armed attack. The Court stated that “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.”¹⁰ However, this pronouncement is unsatisfactory in many ways and does

⁵ Cassese, A. “The International Community’s Legal Response to Terrorism”, 38 *ICLQ*, 1989, p 596

⁶ Levitt, G. “Intervention to Combat Terrorism and Drug Trafficking”, in Damrosch, L and Scheffer, D.(eds.) *Law and Force in the New International Order*, Westview Press, Oxford, 1991, p 226

⁷ Cassese, note 5 *supra*, p 596-7

⁸ Simma, B. *The Charter of the United Nations; A Commentary*, Volume 1, second edition, Oxford University Press, Oxford, 2002, p 800

⁹ Article 3(g) states that “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein” is “qualify as an act of aggression.” See also Chapter 1, section E.2

¹⁰ *Nicaragua Judgment*, ICJ Reports 1986, p 103, para 195

not fit the contemporary practice of international terrorism. In other words, it is not compatible with the complex reality of the modern terror networks.

First, the term “substantial involvement” in the *Nicaragua Judgment* is too vague and susceptible to varied value-oriented interpretations,¹¹ as the Court did not establish any criterion by which “involvement” might be considered sufficiently “substantial” to constitute an armed attack. Second, the phrase “sending by or on behalf a State” suggests the existence of such a close link between the State and the private group, that the latter is akin to a *de facto* State organ.¹² Hence, the acts that amount to an armed attack must be “imputable to a State”¹³ in order to justify defensive response. This view was further advocated by some scholars. Cassese, for example, argues that “international law is clear: the terrorist attack is attributable to the State and a use of force against it by way of individual or collective self-defence is allowed.”¹⁴ This means that an attack executed by terrorist network that has no relation with any State, cannot amount to an armed attack justifying the use of force in self-defence. Indeed, the concept of self-defence against non-State actors has generally been considered problematic. Few States and commentators have explicitly supported a right to use force against a State where the terrorists operated or were present, unless the State’s complicity was clear.¹⁵ Moreover, some terrorist networks operating in the international arena today, such as Al-Qaeda, cannot be seen as a *de facto* organ of any sovereign State. Therefore, this view is not compatible with the contemporary realities and cannot be accepted.

As another point related to the kind of assistance provided by the State, in the *Nicaragua* case, the Court held that a State’s mere passive toleration of private attacks by its nationals or from its

¹¹ Simma, note 8 *supra*, p 801

¹² Ibid

¹³ Greenwood, C. “International Law and the ‘war against terrorism’”, 78 *International Affairs*, 2002, p 308

¹⁴ Cassese, note 5 *supra*, p 598

¹⁵ Gray, C. *International Law and the Use of Force*, second edition, Oxford University Press, Oxford, 2004, p 165

territory was not sufficient to justify a direct attack. Even logistic support or the delivery of weapons were not viewed by the Court as constituting an armed attack that would give rise to a right to use force in self-defence. In the Court's view, "such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of another State,"¹⁶ but, it is not an armed attack. In fact, the denial that the provision of weapons or logistical or other support can amount to an armed attack, although it could be illegal intervention, is an anachronism. This view was rejected by many scholars, as well as Judges of the Court in their Dissenting Opinions,¹⁷ on the basis that it is "flatly wrong as a principle of international law,"¹⁸ too broad and in need of further differentiation.¹⁹ It is unsatisfactory to exclude generally certain types of assistance to terrorism from the category of "substantial involvement" which would equate to armed attack. Indeed, there seems to be no good reason why, if a State knows that a private group is willing to use military force against another State and allows the group to train its members on its territory, harbours them after they have committed these acts, and provides them with weapons and logistical support, such assistance, which the Court itself characterized as illegal intervention, should be considered less substantial than simply sending the group.²⁰ Indeed, State practice shows that this norm of international law has acquired its own "credibility gap" by reason of the divergence between the norm and the actual practice of States.

¹⁶ *Nicaragua Judgement*, (ICJ Reports 1986), p 104, para 195; see also Chapter 1 section E.2

¹⁷ See *Dissenting Opinions of Judges Jennings and Schwebel, Nicaragua Judgement*, ICJ Reports, 1986, p 543 and 259 respectively. Judge Schwebel stated that the Judgement "misconceives and misapplies the law—not in all parts...but in paramount respects: particularly in its interpretation of what is an 'armed attack'".

¹⁸ Moore, J. "The Nicaragua Case and the Deterioration of World Order", 81 *AJIL*, 1987, p 154; Franck T. "Some Observations on the ICJ's Procedural and Substantive Innovations", 81 *AJIL*, 1987, p 119-20

¹⁹ Simma, note 8 *supra*, p 801; Moore, J "The Secret War in Central America and the Future of World Order", 80 *AJIL*, 1986, p 107-9, for the contrary opinion see Briggs, H.W., "The International Court of Justice Lives Up to its Name", 81 *AJIL*, 1987, p 83-4; Gray, note 15 *supra*, p 109-10

²⁰ Simma, note 8 *supra*, p 801

A.2 State practice before the 9/11

Most of the State practice was executed by Israel and USA, since they have been the main targets of terrorist attacks. From a legal point of view, both States adopted the view that anticipatory self-defence against terrorism and States that support and harbour terrorists, to deter the occurrence of similar attacks in the future, is permissible under the UN Charter. The American stance was clearly expressed in 1984, in a speech by the Secretary of State, George Shultz. He said, "We now recognize that terrorism is being used by our adversaries as a modern tool of warfare...to combat it, we must be willing to use military force."²¹ Two years later, Secretary Shultz elaborated on this theme: "We do not have the luxury of waiting until all the ambiguities have disappeared...Our intellectual challenge is especially to understand the need for prudent, limited, proportionate uses of our military power...."²² He then discussed the legality of such responses, clearly explicating the argument in support of the use of military force against terrorism. He stated, "The [U.N.] Charter's restrictions on the use or threat of force in international relations include a specific exception for the right of self-defence....A nation attacked by terrorists is permitted to use force to prevent or pre-empt future attacks, to seize terrorists, or to rescue its citizens, when no other means is available. The law requires that such actions be necessary and proportionate."²³ He extended the argument to include States that harbour and support terrorists, saying, "There is substantial legal authority for the view that a State which supports terrorist or subversive attacks against another State, or which supports or encourages terrorist planning and other activities within its own territory, is responsible for such attacks. Such conduct can amount to ongoing armed aggression against the other State under

²¹ *US Department of State, American Foreign Policy: Current Documents*, 1984, p 314-5 (1986)

²² *Low-Intensity Warfare: The Challenge of Ambiguity*, Remarks by the George P. Shultz, the US Secretary of State, before the *Low-Intensity Warfare* Conference, National Defence University, Washington, D.C., 25 January 1986, p 7

²³ *Ibid*, p 11-2

international law.”²⁴ Although the proposal of the use of force against terrorists and States harbour them was presented by Secretary Shultz as anticipatory self-defence, it is more accurately characterized as “defensive reprisal”, because it combined elements of an immediate retribution with a projected application of its right of self-defence.²⁵

A.2.1 The Israeli attacks on Lebanon 1968 and 1975

The first such case of the use of force against terrorism was exercised in 1968 when the Israeli air forces attacked Beirut airport. Israel argued that it was entitled to exercise its right of self-defence in response to earlier attacks on an Israeli aircraft in Athens airport, carried out by terrorists based in Lebanon.²⁶ Israel accused Lebanon of allowing Arab terrorist organizations to base themselves in Beirut and to run training camps in Lebanon, and thereby officially encouraging warfare by terror against Israel. The Lebanese government, Israel maintained, had assumed responsibility for the activities of terror organizations.²⁷ The Security Council, however, rejected this explanation, and unanimously condemned the Israeli action as a “violation of [Israel’s] obligations under the Charter and the cease-fire resolutions.”²⁸ Notably, although the USA joined in the condemnation, it made clear that it took this stance only because Lebanon had not in fact been responsible for the terrorist attack on Athens airport and the Israeli action was disproportionate to the harm suffered; it did not reject the idea of deterrence action in principle. A State that is victimized by continuing terrorist attacks may in response take appropriate military measures to defend itself against further attacks, as part of the inherent right of self-defence recognized in the UN Charter.²⁹ However, this thinking was not adopted by the other States in the Security Council in 1968; nevertheless, it was repeated by the USA and Israel on

²⁴ Ibid

²⁵ See section B.5 below

²⁶ Falk, R. “Beirut Raid and the International Law of Retaliation”, 63 AJIL, 1969, p 415-6

²⁷ Ibid, p 416-7

²⁸ Security Council Resolution 262 of 31 December 1968

²⁹ UN Yearbook, 1968, p 228

subsequent occasions.³⁰ In 1975 Israel once again resorted to force when it launched pre-emptive attacks on Palestinian camps in Lebanon. The action was unanimously condemned by the Security Council, including the USA.³¹

A.2.2 The Israeli attack on Tunisia 1985

In another incident in 1985, Israel attacked Tunis, claiming that it was acting against the PLO headquarters in response to Palestinian terrorists' attacks on Israelis abroad. It also claimed that Tunisia's international obligations required it to prevent such attacks from being carried out from its territory. Israel claimed to be acting in self-defence—an argument accepted by the USA in the Security Council debate.³² The other member States, however, disagreed, and strongly condemned the Israeli action as an act of armed aggression against Tunisia's territory, contrary to the provisions of the UN Charter.³³ Eventually, the Council "condemn[ed] vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct."³⁴ The US, however, abstained.

A.2.3 The American air strikes on Libya 1986

As mentioned above, throughout the 1980s, an increasing trend appeared to emerge for State support for acts of international terrorism, leading the American administration openly to characterize it as an act of war, warranting a military response. The first implementation of this American strategy was against Libya in 1986, following successive terrorist incidents linked to

³⁰ Falk, note 26 *supra*, p 417

³¹ The Lebanese delegate in the Council summarized the reasoning for the condemnation. He said that, "Israel...has stated that the aggression it undertook was not punitive in nature. This is a dangerous course to follow in international affairs. Are States to be allowed to determine on their own what should be termed preventive acts? If so, this will lead the world back to the law of the jungle, and far away from the international order based on the principles of the Charter of the United Nations." See in the SCOR, Thirtieth Year, 1859th Meeting, 4 December 1975. p 11, para 99

³² *UN Yearbook*, 1985, p 285

³³ Security Council 2610th and 2615th Meetings, 1985

³⁴ Resolution 573 of 4 October 1985. The resolution was adopted by 14 votes to none with the USA abstention

Libya, in the context of open military confrontation between the United States and Libya. Finally, in April 1986 following a bombing in West Berlin, causing two deaths and large-scale injury, the US air forces carried out a substantial air raid against various targets in Tripoli.³⁵ The U.S. Government put forward apparently hard evidence of Libya's culpability. Following the U.S. attack, the U.S. representative to the United Nations explained the American position in a letter to the President of the Security Council, which asserted that "The United States forces have exercised the United States right of self-defence by responding to an ongoing pattern of attacks by the Government of Libya....The Libyan policy of threats and use of force is in clear violation of Article 2(4) of the U.N. Charter. It has given rise to the entirely justifiable response by the U.S."³⁶

Most members of the Council rejected the US argument, on the ground that self-defence should be narrowly interpreted and could not be pre-emptive and voted to condemn the action. However, the UK and France joined the USA in vetoing the condemnation resolution.³⁷ The UK accepted that "the right of self-defence is not an entirely passive right"; seeing it as within the inherent right of self-defence to attempt to repel terrorism and to discourage further attacks.³⁸

A.2.4 The American attack on Iraq 1993

The right of self-defence was further cited by the USA to justify its missile attack on the Iraqi Intelligence Headquarters in Baghdad, in June 1993. The US accused Iraq's Intelligence Agency of culpability in the assassination attempt on ex-President Bush (senior) in Kuwait, two months previously.³⁹ The American Permanent Representative in the Security Council, Ambassador

³⁵ Leich, M. "Contemporary Practice of the United States Relating to International Law", 80 *AJIL*, 1986, p 633

³⁶ Letter from the US Permanent Representative to the UN to the President of the Security Council dated 14 April, 1986, Quoted in *Ibid*, p 632-3

³⁷ *UN Doc. S/18016/Rev.1* (1986) Australia and Denmark also rejected the draft resolution

³⁸ Quoted in Gray, note 15 *supra*, p 162

³⁹ Reisman, W. "The raid on Baghdad: Some Reflections on its Lawfulness and Implications", 5 *EJIL*, 1994, p 120-1; Kritsiotis, D. "The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in

Madeleine Albright, said the assassination conspiracy amounted to “a direct attack on the United States, an attack that required a direct United States response [and to which we] responded directly, as we are entitled to do under Article 51 of the United Nations Charter, which provides for the exercise of self-defence in such cases.”⁴⁰ This time, members of the Security Council were more sympathetic towards the American position and the Security Council did not pass any resolution on the matter.⁴¹ The UK response was fairly cautious; it accepted that force might be used in self-defence against threats to one’s nationals, where the target continued to support terrorist acts against one’s nationals and no alternative existed.⁴² Russia accepted the American argument, without reservation.⁴³ Some writers have, hence, been induced to see this event as marking the emergence of a new rule of international law permitting the use force in response to terrorism. Whilst a few States expressed concern,⁴⁴ only China explicitly condemned the US action.⁴⁵ Other States generally expressed understanding of the US action.⁴⁶

A.2.5 The American strikes on Afghanistan and Sudan 1998

Similarly, when terrorist attacks on US embassies in Kenya and Tanzania in August 1998 were countered by American missile attacks on a terrorist training camp in Afghanistan and a pharmaceutical plant in Sudan, there was little international outcry. The USA justified its actions on the grounds that the camp had been used by the Al Qaeda organization to support terrorism

International Law, 45 *ICLQ*, 1996, p 162-3; Greenwood, C. “International Law and the United States Air Operation against Libya” 89 *West Virginia Law Review*, 1986-1978, p 933

⁴⁰ Speech of Madeleine Albright, US Representative to the UN, before the Security Council (27 June, 1993) Quoted in Kritsiotis, *ibid*, p 163

⁴¹ *UN Doc. S/5657*, 27 June 1993

⁴² “UK Materials on International Law”, 64 *BYIL*, 1993, p 732; see also Speech by the British Foreign Secretary before the House of Commons on 28 June 1993. Quoted in Kritsiotis, note 39 *supra*, p 165

⁴³ *UN Yearbook*, 1993, p 431

⁴⁴ Egypt, Saudi Arabia, Turkey and Iran criticized the US action against Iraq, Kritsiotis, note 39 *supra*, p 164

⁴⁵ *UN Yearbook*, 1993, p 431

⁴⁶ *Ibid*. The Japanese representative, for example, noted that, given the facts as represented, the US response was an “unavoidable situation.” *UN Doc. S/5657*, 27 June 1993

and that the pharmaceutical plant also produced chemical weapons for terrorist activities.⁴⁷ The United States reported the operations to the Security Council as follows: “These attacks were carried out only after repeated efforts to convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization. That organization has issued a series of blatant warnings that ‘strikes will continue from everywhere’ against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right of self-defence confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.”⁴⁸ Sudan called for a meeting of the Security Council, but the American action issue was not put on the agenda and no action was taken pursuant to the short meeting. The US use of force was condemned by Arab States, the Non-Aligned Movement, Pakistan and Russia. Others refrained from condemnation or expressed support, without, however, espousing the US doctrine of self-defence.⁴⁹

A.3 Summary of the period prior to the 9/11 events

State practice shows that States have responded to terrorist attacks with immediate military measures, such as attacking States harbouring or actively supporting terrorists, bombing terrorist bases tolerated by States. On a number of occasions, Israel and the USA, have responded to attacks coming from terrorists living in other States, with forcible action against the States

⁴⁷ Murphy, S. “Contemporary Practice of the United States Relating to International Law”, 93 *AJIL*, 1999, p 161-2

⁴⁸ Letter dated 20 August 1998 from the US Permanent Representative of to the United Nations to the President of the Security Council. *UN Doc. S/1998/780* (1998)

⁴⁹ Gray, note 15 *supra*, p 163

concerned, and have sought to justify their actions, both as self-defence against attack as provided for under Article 51 of the UN Charter, and as a means of deterring further attacks. As to the legality of these actions, from examination of State and UN reactions, it can be seen that most States were convinced that it is impermissible under the UN Charter. Only a few States, among them Israel, the US and the United Kingdom, have adopted the standpoint that there are in some circumstances, at least, when such action may be justified. Thus, although the majority of the UN members deny the legitimacy, under the UN Charter, of defensive reprisal and anticipatory self-defence against terrorism, some important States think otherwise.⁵⁰ Therefore, it can be argued that, prior to the events of 9/11, there was no consistent legal view regarding the lawfulness or unlawfulness of forcible action against terrorists and States that sponsor them. However, it seems that during the Nineties, States were more willing to accept military actions against terrorists and States that support and harbour them. This can be inferred from the international reactions to the cases during this period.

In relation to the present study, these practices evince that States resorted to military action only after the occurrence of a terrorist attack or a series of attacks against them with a substantial effect and the aim of the action was to prevent future attacks from the same source.⁵¹ This means that States did not see that military action against terrorists and States harbour them can be taken pre-emptively, in the sense that it can be carried out without recent precedent of terrorist attack. Furthermore, the States against which the actions were taken were all accused of complicity in acts of terrorism, apart from Tunisia, which was attacked as the State where the PLO (which was

⁵⁰ Cassese, A, *International Law*, second edition, Oxford University Press, Oxford, 2005, p 476

⁵¹ This understanding is also supported by President Clinton's justification for the action against Afghanistan and Sudan, he stated: "I order this action for four reasons: First, because we have convincing evidence these groups played the key role in the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth, because they are seeking to acquire chemical weapons and other dangerous weapons." Remarks of President Clinton, 34 Weekly Comp. Pres. Doc. 1642 (20 August 1998)

blamed for attacks on Israel) was headquartered. In each of these cases, there was a strong and obvious link between the terrorists and the target State.

Section B: September 11 attacks and their implications of the use of force
against terrorism

Following the 9/11 attacks, the US enforcement agencies mounted a massive criminal investigation. The outcome was that the perpetrators of the attacks were Al-Qaeda operators authorized and funded by the Saudi expatriate, Osama bin Laden, based in Afghanistan.⁵² The United Kingdom government also released a document entitled “Responsibility for the Terrorist Atrocities in the United States, 11 September 2001.” The document confirmed the US findings and reported on Osama bin Laden, Al-Qaeda, and their relationship to the *de facto* government in Afghanistan, the Taliban.⁵³

The US government communicated with the Taliban regime, through the government of Pakistan,⁵⁴ demanding the handover of Al-Qaeda leader and members to the US and closure of their training camps on Afghan soil. These demands were announced publicly by President Bush with a threat of the use of force, if the Taliban authorities did not comply. In his Address before the Joint Session of the Congress, President Bush stated: “The United States of America makes the following demands on the Taliban: Deliver to the United States authorities all the leaders of Al-Qaeda who hide in your land...close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can

⁵² Murphy, S. “Terrorist Attacks on World Trade Centre and Pentagon”, 96 *AJIL*, 2002, p 238-41

⁵³ UK Press Release, 10 Downing Street Newsroom, “Responsibility for the Terrorist Atrocities in the United States, 11 September 2001,” 4 October 2001, available at <[http://www-number-10.gov.uk/news.asp?NewsID=2686](http://www.number-10.gov.uk/news.asp?NewsID=2686)>

⁵⁴ There was no diplomatic relations between the US and the Taliban regime since it seized power in Afghanistan in 1994. For the history of Taliban, see Rashid, A, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia*, Yale University Press, New Haven, 2001

make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate.”⁵⁵ Thus, the US clearly took the position that it would not differentiate between terrorists and States who harboured them, and it would treat any nation that assisted terrorists as a hostile regime. The Taliban, however, refused to comply with the American demands, without proof of Osama bin Laden’s involvement in the 9/11 attacks.⁵⁶ In response, President Bush declared the global war against terrorism.

Notably, at no point in these massive investigations by the US and the UK was Iraq mentioned. No indication whatsoever was given that Al-Qaeda had any link with the government in Baghdad. No mention was made of Al-Qaeda having has or had training camps in Iraq or receiving support in any form from Saddam Hussein. One could argue that if there was any link between Iraq and the atrocities of 9/11 it would certainly have appeared at this time.

B.1 The Security Council and the World Community response

The American government evidently considered the September 11 attacks as amounting to armed attack justifying the use of force in self-defence.⁵⁷ Most of the international community took a similar view. In response to the events, the Security Council adopted Resolutions 1368 and 1373,⁵⁸ which condemned the terrorist attacks and called for international cooperation to combat terrorism. The Preamble of Resolution 1373 confirmed that international terrorism constitutes a threat to international peace and security and emphasized “the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security

⁵⁵ President Bush Address before the Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, (20 September 2001) see in 37 Weekly Comp. Pres. Doc. 1348

⁵⁶ Murphy, S. “Terrorist Attacks on World Trade Centre and Pentagon”, note 52 *supra*, p 244

⁵⁷ Ibid, p 242

⁵⁸ Security Council Resolutions 1368 of 21 September, 2001 and 1373 of 28 September, 2001

caused by terrorist acts.”⁵⁹ Most importantly, both resolutions, while not explicitly authorizing the use of force, recognized the inherent right of self-defence in connection with terrorist attacks.⁶⁰

Outside the UN, the North Atlantic Council unanimously adopted a statement, grounded upon Article 5 of the NATO Statute (Washington Treaty), which provides for the right of collective self-defence, should any of the 19 members of the Alliance be subjected to an attack.⁶¹ The European Union, in a declaration by the European Council of 21 September, went a step further and made it clear that “on the basis of Security Council Resolution 1368, a riposte by the US is legitimate”⁶² The Organization of American States (OAS) adopted a resolution stating that “these terrorist attacks against the United States of America are attacks against all American States and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).”⁶³

This overwhelming support of the US indicates that most States of the world community viewed the events 9/11 as amounting to an armed attack justifying the use of force in self-defence. Indeed, the savagery and gravity of the attacks would certainly not be considered anything less than an actual armed attack if carried out by a conventional army and, hence, satisfied the requirement of “gravity” stated by the ICJ. However, the other pre-conditions in the ICJ’s formula—that the attack must be imputable to a State (not non-state actors) and that that State should have “substantial involvement” in the attack (not merely provide passive assistance or logistic support)—seem to be absent in this case. In fact, it was not claimed that Al-Qaeda was

⁵⁹ Resolution 1373, *ibid*

⁶⁰ *Ibid*

⁶¹ North Atlantic Treaty Organization (NATO), Press Release No. 124, Statement by North Atlantic Council, 12 September 2001)

⁶² Conclusions and plan of action of the Extraordinary European Council Meeting of 21 September 2001, SN140/01

⁶³ *Terrorist Threat to Americas*, Resolution 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs, OAS Doc. OEA/Ser.F/II.24/Res.1/01 (21 September, 2001) available at <<http://www.oas.org>>

acting on behalf of the Afghani authorities, or that the Taliban regime had provided more than a training-ground and safe-haven for Al-Qaeda members. The Nicaragua norms, however, were evidently changed after the attacks.

B.2 The Law after 9/11

B.2.1 The right of self-defence against “non-State actors”

As mentioned above, the Preamble of Resolution 1373, as well as Resolution 1368, recognized the inherent right of self-defence in connection with the attacks. That recognition of the right of self-defence leaves no doubt that the Security Council considered that terrorist attacks on this massive scale, carried out by non-State actors, can amount to an armed attack for the purpose of Article 51.⁶⁴ Thus, the resolution altered the concept established by the ICJ in the *Nicaragua* case, that the attack must be imputable to a State. Some commentators, however, have questioned whether these resolutions do, in fact, support self-defence in response to terrorist attack by non-state actors, because such a right is only mentioned in the preamble, not stated in the operative part of the resolutions, and the exact words used are “threat to international peace and security” rather than “armed attack” as in Article 51.⁶⁵ Cassese, for example, argued that Resolutions 1368 and 1373 recognized the right of individual and collective self-defence, but noted that they characterized the terrorist acts of 11 September as a ‘threat to the peace’, but not as an ‘armed attack’, which would legitimize self-defence under Article 51.⁶⁶

Indeed, the resolution did not explicitly point out that terrorist attacks amount to an armed attack. Nevertheless, as mentioned in chapter 4, according to Article 31(2) of the Vienna Convention, all elements comprised in a given resolution, including all its parts such as the preamble and annexes should be considered since they form a part of or are intimately related to the

⁶⁴ Greenwood, “International Law and the ‘war against terrorism’”, note 13 *supra*, p 308

⁶⁵ Gray, note 15 *supra*, p 165

⁶⁶ Cassese, A. “Terrorism is also Disrupting some Crucial Legal Categories of International Law”, 12 *EJIL*, 2001, p 996

resolution.⁶⁷ Furthermore, the resolution should be interpreted in the light of its purpose and objective of combating and eliminating the threat of international terrorism.⁶⁸ Applying these rules in interpreting Resolution 1373, one can conclude that the Council viewed terrorist attacks by non-State actors on this massive scale as amounting to an armed attack for the purpose of Article 51. This view was held by many writers. Gray, for example, argued that “it seems clear from the international reaction at the time that the members of the Security Council were in fact willing to accept the use of force in self-defence by the USA in response to the terrorist attacks.”⁶⁹ As to the recognition of the right of self-defence in the Preamble, she pointed out that “the reference to self-defence in the preamble is of greater significance than might appear taken in isolation, because the Security Council does not commonly make any express reference to the right of self-defence in its resolutions.”⁷⁰ Indeed, this explicit recognition of the right of self-defence would be meaningless, unless the Council considered that these attacks could justify the use of force in self-defence.

It should be noted, however, that the ICJ in 2004, in its *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, repeated its previous view that self-defence is permissible against States only. The Court enunciated that “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”⁷¹ Accordingly, the Court still rejects the idea that the right of self-defence may be applied against non-state actors. This view, however, was criticized by Judge Higgins in her Separate Opinion. She correctly observed that “there is,

⁶⁷ See Chapter 4, section B.2.3

⁶⁸ See Chapter 4, section B.3

⁶⁹ Gray, note 15 *supra*, p 165; see also Byers, M. “Terrorism, the Use of Force and International Law after 11 September”, 51 *ICLQ*, 2002, p 412; Franck, T, M. “Terrorism and the Right of Self-Defence”, 95 *AJIL*, 2001, p 839; Murphy, “Terrorist Attacks on World Trade Centre and Pentagon”, note 52 *supra*, p 244

⁷⁰ Gray, note 15 *supra*, p 165

⁷¹ *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports, 2004, in 43 *ILM*, 2004, p 1050

with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by State.”⁷² Despite the ICJ’s view, it could be concluded that today the vast majority of States and writers of the opinion that the right of self-defence can be applied against non-state actors.

B.2.2 New standards of State responsibility

Initially, the Preamble of Resolution 1373 recalled the principle established by the General Assembly Declaration of Friendly Relations which states that “Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”⁷³ Acting under Chapter VII, the Council moved forward to set out a range of general measures for all States to undertake in combating terrorism. These measures subsumed obligations on all States to refrain from providing any kind of support for terrorist groups and to “take the necessary steps to prevent the commission of terrorist acts.”⁷⁴ Article 2 (a) of the resolution states that all States shall “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.”⁷⁵ Other articles provide for obligations such as “prevent[ing] and suppress[ing] the financing of terrorist acts” and “freez[ing] without delay funds and other financial assets” of terrorist networks. Importantly, the resolution laid down an obligation on all States to “deny safe haven to those who finance, plan, support, or commit terrorist acts.”⁷⁶

⁷² Separate Opinion of Judge Higgins, in *Ibid*, p 1063

⁷³ *Friendly Relations Declaration*, The General Assembly Resolution 2625 (XXV)

⁷⁴ Security Council Resolution 1373 of 28 September, 2001

⁷⁵ *Ibid*

⁷⁶ *Ibid*

Resolution 1373 thus imposes new standards of State responsibility, stating that States will be held liable for assistance, of any kind, to international terrorist groups. The Council has gone well beyond the standards applied in the *Nicaragua* case, deciding that a State that provides, or fails to suppress the provision of logistics, finances, asylum, or materials to international terrorist groups is to be held culpable.⁷⁷ In other words, the Council has broadened the scope of State involvement to subsume any degree of support, even the providing of passive support or safe-haven; any such assistance would render the State responsible for the attack. This, of course, constitutes a departure from the classic form of self-defence, where the target is the State that committed the aggression; now, the target is the terrorist organization and the State who harbouring it. The legal justification for violating the sovereignty of that State is that it is in breach of its international obligations, by aiding and abetting terrorism.⁷⁸

It has been argued that the right to take defensive measures against a State that harbours terrorists only applies in certain strictly defined circumstances, where “the State actively assists terrorists or allows them to mount serious, repeated, and large-scale terrorist onslaughts on other States.”⁷⁹

In fact, however, the resolution did not distinguish between active or passive assistance. The Council did not exclude States that passively support acts of terror from the possible response of the attacked State. Hence, it could be argued that, according to Resolution 1373, a State that merely tolerates terrorist groups within its borders and is reluctant to take the necessary steps to suppress them and to prevent the commission of terrorist acts starting from its territory against another State can still be held responsible for the consequences. Indeed, as the ILC concluded, “it

⁷⁷ Wedgwood, R. “The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence”, 97 *AJIL*, 2003, p 583

⁷⁸ Cassese, A. “Terrorism is also Disrupting some Crucial Legal Categories of International Law”, note 66 *supra*, p 997

⁷⁹ Cassese, *International Law*, note 50 *supra*, p 476

is peremptory that a State is responsible for the consequences of permitting its territory to be used to injure another State.”⁸⁰

One may argue that this proposition is too broad and might lead to the risk that a State, victim of a terrorist attack, might rush to accuse another State of tolerating or supporting terrorism and claim the right to take defensive measures against it; therefore, the criterion set out by the ICJ in the *Nicaragua* case is more conservative and lessens this risk. On the other hand, however, taking into consideration the modern practice of international terrorism, today the criterion of the ICJ is not sufficient to confront this phenomenon. It would lead to the result that States are not sufficiently protected by Article 51 of the Charter against the indirect use of force by other States, thereby, undermining the intention of this rule.⁸¹ Nevertheless, it is admitted that extending the right of self-defence to include the use of force against terrorists and States that harbour them raises the risk of arbitrary exercise. In fact, the exact scope and pre-conditions for this new right are still unclear and, in order to avoid this risk, further clarification on the conditions for exercising this right is essential. For example, it is still unclear how the scale of the attack can be measured and who is competent to decide whether the degree of destruction caused by the terrorist attack amounts to an armed attack justifying the use of force in self-defence. Furthermore, the extension of the right of self-defence to include terrorists and States harbouring them poses serious problems with regard to the target, objective and duration of self-defence.⁸²

Traditionally, self-defence has been considered legitimate only against the aggressor State or States. Thus, there was no ambiguity as to the target. Following the 9/11 attacks, however, it was

⁸⁰ International Law Commission, State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, *UN Doc. A/CN.4/L.602/Revs. 1, 2* (2001)

⁸¹ Simma, note 8 *supra*, p 801

⁸² Cassese, A. “Terrorism is also Disrupting some Crucial Legal Categories of International Law”, note 66 *supra*, p 997

accepted that the USA made its own determination as to which State had harboured, supported, and assisted the attackers, thereby becoming culpable and rendering itself open to a legitimate military response.⁸³ Furthermore, the terror organization may have links with more than one country. Al-Qaeda, for example, has been said to span as many as 60 countries; could all these countries be a legitimate target for military response?⁸⁴ In reality, this would lead, as it already has in the case of Iraq, to the possibility that the victim State may choose more than one target. As to the questions of objective and duration of self-defence, under the classic formula of self-defence the purpose of the defensive action was to repel the aggression and would therefore end once that aim was fulfilled. Thus, the use of force has a clear ending, namely, when the aggression is repelled. The action in self-defence post-9/11 is indeterminate; does it last until the target State revokes its policies? Or until the regime in that State is changed? Remarkably, the US after the 9/11 attacks asserted that the war on terrorism would take years.⁸⁵ Most significantly, the right of self-defence against States that harbour terrorists raises the question as to who has authority to decide that the evidence of State complicity is sufficient to legitimize the use of military force.⁸⁶ This latter issue is of particular significant in the case of Iraq, as will be discussed later.⁸⁷

B.3 Resolution 1373 as a legislative act

Apart from the problems associated with the new standards of State responsibility, in fact, Resolution 1373 is a new universal legislation on terrorism, binding on all Member States of the United Nations. It was not simply an individualized resolution, addressing a specific event or a single country; it was a new legislative or generic resolution. For a long time, the prevailed view

⁸³ Cassese, A, *International Law*, note 50 *supra*, p 474

⁸⁴ Cassese, A. "Terrorism is also Disrupting some Crucial Legal Categories of International Law", note 66 *supra*, p 997

⁸⁵ Ibid, p 998

⁸⁶ Byers, note 69 *supra*, p 413

⁸⁷ See section D.1 below

was that “there is no machinery of international legislation”⁸⁸ and that States are the legislators of the international legal system. However, Resolution 1373 can be considered a turning-point to a new legislative era.⁸⁹ As the representative of Angola stated in the Council debate on 22 April, 2004: “By adopting Resolution 1373 (2001), the Security Council took the unprecedented step of bringing into force legislation binding on all States on the issue of combating terrorism.”⁹⁰ Similarly, in a briefing on the Council’s schedule for April 2004, the Council President, referring to the ongoing consultation for the prospective Resolution 1540⁹¹ (another legislative resolution), described that process as “the first major step towards having the Security Council legislate for the rest of the United Nations’ membership.” He cited Resolution 1373 as “the first step” and suggested that such legislative work would become, increasingly, a role of the Council.⁹² Indeed, the prevalent conception of legislative authority in the UN setting, as expressed by Edward Yemin, is that: “legislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is directed to indeterminate addressees and capable of repeated application in time.”⁹³ Thus, international legislation⁹⁴ is characterized by the general and abstract character of the obligation imposed. Applying these standards to Resolution 1373, one could argue that the resolution fulfils all the essential characteristics to be considered as a legislative act. For

⁸⁸ *Oppenheim’s International Law*, Ninth edition, [Robert Jennings & Arthur Watts. eds.], Longman, London, 1992, p

⁸⁹ Talmon, S. “The Security Council as World Legislature”, 99 *AJIL*, 2005, p 175

⁹⁰ *UN Doc. S/PV. 4950*, p 9-10 (2004)

⁹¹ Resolution 1540 of April 28, 2004, is the most recent example of Security Council legislation. In that resolution also the Council imposed a range of universal obligations on all States to keep weapons of mass destruction and their means of delivery out of the hands of non-State actors

⁹² Press Conference by the Security Council President (April 2. 2004), See at <<http://www.un.org/News/briefings/docs/2004/pleugerpc.DOC.htm>>

⁹³ Yemin, E. *Legislative Powers in the United Nations and Specialised Agencies*, Leyden, 1969, p 6

⁹⁴ Writers have used the expression “international legislation” in different ways. Sometimes it is used broadly to cover “both the process and the product of the conscious effort to make additions to, or changes in, the law of nations.” It has also been used to denote the conclusion of lawmaking treaties (i.e., multilateral treaties on matters of general interest), the making of customary international law, and the adoption of binding decisions by international organizations.

instance, while Resolution 1390 provides that “all States shall...freeze without delay the funds and other financial assets or economic resources”⁹⁵ of Osama bin Laden, members of Al Qaeda, and the Taliban, and other individuals, groups, undertakings, and entities associated with them, Resolution 1373 calls for the same measures, but expresses the target in more general terms, saying that “all States shall...freeze without delay the funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts.”⁹⁶ The key feature of this new type of legislative or generic resolution is, as expressed by the Colombian delegate to the Security Council, that it “does not name a single country, society or group of people.”⁹⁷

From another point of view, it is given that the Security Council resolutions adopted under Chapter VII of the UN Charter are of mandatory character and, hence, binding upon Member States. Obligations enacted by these mandatory resolutions take precedence over any other obligations or rules, this principle was confirmed by the ICJ in the *Lockerbie* case.⁹⁸ Accordingly, the obligations set forth in Resolution 1373 take priority over the criteria established by the ICJ in the *Nicaragua* case or by the Definition of Aggression.

B.4 Is the new right of the use of force against terrorism amount to customary rule?

It has been argued that the position of the Security Council, coupled with the lack of challenge and indeed massive support by States for the US war against terrorism, could be seen as amounting to instant customary international law and an authoritative re-interpretation of the

⁹⁵ Security Council Resolution 1390 of 16 January, 2002

⁹⁶ Security Council Resolution 1373 of 28 September 2001

⁹⁷ Quoted in Talmon, note 89 *supra*, p 177

⁹⁸ The Court stated that “Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court . . . considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.” *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p 15

Charter, at least with regard to terrorism.⁹⁹ On the other hand, there are those who, while admitting the existence of a substantial trend in the international community towards a new concept of self-defence, argue that this was largely an exceptional response, motivated by the horror of the 9/11 events, and that it may not provide sufficient evidence of consistent practice and *opinio juris* to amount to a customary change.¹⁰⁰ In Cassese' view, for example, the legal regime laid down in the UN Charter and in customary international law has primacy and express, clear and consistent behaviour and opinion of States, in more than one instance, would be required before those rules could be considered to be modified.¹⁰¹

Indeed, duration is one of the elements of custom among others such as uniformity, consistency, generality of the practice, and the *opinio juris et necessitates*. However, given clear evidence as to the consistency and generality of a practice, which will be shown in part over the passage of time, no particular duration is required. A long practice or repetition of the practice in more than one instance is not necessary.¹⁰² The practice of the ICJ does not show any special emphasis on time period or number of occasions.¹⁰³ Furthermore, in some areas of law, for example pertaining to airspace and continental shelf, customary rules have evolved quite rapidly.¹⁰⁴ Even if Cassese's argument is accepted, the war between Hezbollah and Israel in 2006 seems to be a second instance where most States, including Arab States, while condemning the disproportionate level of Israeli force, did not deny its right to use force in response to Hezbollah's terrorist attack.¹⁰⁵ Therefore, it could be argued that the 'new legislation' enacted by Resolution 1373 and the international reaction to the events of 9/11, including the massive

⁹⁹ Gray, C. "The Use of Force and the International Legal Order" in Evans, M [ed.], *International Law*, Oxford University Press, Oxford, 2003, p 604

¹⁰⁰ Cassese, *International Law*, note 50 *supra*, p 475

¹⁰¹ Ibid

¹⁰² Brownlie, note 3 *supra*, p 7

¹⁰³ See, for example, *Fisheries* case, ICJ Reports, 1951, p 131; *Asylum* case, ICJ Reports, 1950, p 276-7

¹⁰⁴ Brownlie, note 3 *supra*, p 7

¹⁰⁵ See section B.6.3 below

support to the US in fighting international terrorism, are to be taken as evidence of customary international law or, at least, will influence the development of a new or emerging customary law rule. Indeed, the widespread international acceptance of and support for US and UK action against Afghanistan may be regarded as reflecting an *opinio juris* as to the legitimacy of defensive action against States that harbour and support terrorism.¹⁰⁶

B.5 Necessity of the use for force against past terrorist attacks

The fundamental problem associated with the right of self-defence against terrorism is regarding the condition of necessity of the use of force in response to past terrorist attack. As mentioned in Chapter 3, necessity is a condition for invoking the right of self-defence, whether in anticipatory mode or in the reactive mode.¹⁰⁷ This condition means that a response with force is only permissible when the situation is “instant, overwhelming, and leaving no choice of means and no moment for deliberation.”¹⁰⁸ In the case of terrorism, legally speaking, the use of force in response to past attacks involves two propositions: on the one hand, it is punitive rather than defensive action, because the harm is already done.¹⁰⁹ From this perspective, the action is totally illegal, as armed reprisal is prohibited under the UN Charter.¹¹⁰ The second is that the use of force in response to past terrorist attack is to prevent future attacks. Hence, the action will be defensive rather than punitive.¹¹¹ The first view considers actions in response to past terrorist attack more in the nature of retaliations, because they are in the classic form of an armed reprisal, given their essentially retributive (as opposed to defensive and protective) nature.¹¹² According to proponents of that view, even if the target was those actually responsible for the terrorist

¹⁰⁶ See section B.6.1 below

¹⁰⁷ See Chapter 3, section D.1

¹⁰⁸ This formula was adopted by the American Secretary of State Daniel Webster in the *Carolina* affairs of 1937. See section C.1 below

¹⁰⁹ Gray, *International Law and the Use of Force*, note 15 *supra*, p 167

¹¹⁰ See Chapter 1, section A

¹¹¹ Bowett, D. “Reprisals Involving Recourse to Armed Force”, 66 *AJIL*, 1972, p 3-4

¹¹² Gray, *International Law and the Use of Force*, note 15 *supra*, p 163; see also Kritsiotis, note 39 *supra*, p 166

attacks, and even if the response was considered to be proportionate, the criterion of necessity would not be met, since the attacks had already taken place.¹¹³ Since armed reprisals are absolutely prohibited under the UN Charter, they cannot be encompassed in self-defence pursuant to Article 51.¹¹⁴ Proponents of this view point to the Declaration on Friendly Relations and the Declaration on the Inadmissibility of Intervention where the General Assembly stated that "States have a duty to refrain from acts of reprisal involving the use of force."¹¹⁵ They also allude to Resolution 188 (1964) where the Security Council, in response to the British attack on Yemen, condemned reprisals as incompatible with the purposes and principles of the UN.¹¹⁶

On the other hand, some authors argue that armed reprisal is permissible if it is defensive in aim; so-called "defensive reprisal." This concept suggests that, notwithstanding the technical illegality of reprisal, it is legitimate in the case of terrorism, as a deterrent or protective action against future attacks (i.e. defensive in aim). Thus, a distinction is drawn between reprisals with defensive and those with punitive aims. In other words, the *de jure* status of reprisals as illegal must be differentiated from their *de facto* acceptance as permissible and necessary actions in self-defence.

The leading authority on the concept of defensive reprisal is Bowett. He stated that "indeed, within the whole context of a continuing State of antagonism between States, with recurring acts of violence, an act of reprisal may be regarded as being at the same time both a form of punishment and the best form of protection for the future, since it may act as a deterrent against future acts of violence by the other party."¹¹⁷ By way of illustration, he poses the case where a State, suffering guerrilla raids originating in another State, responds with attacks against guerrilla

¹¹³ Gray, *ibid*

¹¹⁴ Brownlie, I. *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1963, p 281

¹¹⁵ The *Declaration on Friendly Relations*, Resolution 2625 of October 1970

¹¹⁶ Resolution 188 of 1964

¹¹⁷ Bowett, note 111 *supra*, p 3

bases in the harbouring State. In Bowett's view, such a response could be justified as anticipatory self-defence, and he argues that to reject such action would be extremely unrealistic in the modern era and inconsistent with State practice.¹¹⁸ He also pointed out that the Security Council position is "moving towards a partial acceptance of reasonable reprisals."¹¹⁹ Many authors support this proposal. Schachter, for example, accepts the possibility of defensive reprisals "since its prime motive would be protective, not punitive."¹²⁰ However, he emphasises that there must be continuing and imminent threat coming from the same source of aggression to justify the use of force in anticipatory form: "defensive retaliation" is permissible "when a State has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action."¹²¹

This latter view seems more sensible. Today, terrorism has become a major issue facing the world community. International terrorism is been used as another weapon of warfare to gain strategic advantage where conventional means are useless. Therefore, to outlaw armed reprisals altogether, including actions that are defensive in aim and designed to deter future attacks, would simply allow those who use terrorism as a tool of warfare to escape liability for their actions and would deny the victim State its basic and inherent right to defend itself against further attacks. For these reasons, it can be argued that the view which prohibits defensive reprisals is unrealistic and anachronistic.

¹¹⁸ Ibid, p 3-4

¹¹⁹ Ibid, p 21

¹²⁰ Schachter, "The Right of States to Use Armed Force", 82 *Michigan Law Review*, 1984, p 1638

¹²¹ Ibid. Tucker also defended the legality of defensive reprisal as its aim is to "induce a delinquent State to abide by the law in the future." Tucker, R. "Reprisals and Self-Defence: The Customary Law", 66 *AJIL*, 1972, p 591. Similar view was expressed by Dinstein, he argues that "To be defensive, and therefore lawful, armed reprisals must be future-oriented, and not limited to a desire to punish past transgressions" Dinstein, Y. *War, Aggression and Self-Defence*, fourth edition, Cambridge University Press, Cambridge, 2005, p 227; see also O'Brien, W. "Reprisals, Deterrence and Self-Defence in Counter-terror Operations", 30 *Virginia Journal of International Law*, 1989, p 421; Reisman, note 39 *supra*, p 127

As to the question of the necessity of use of force against past attacks, it is admitted that terrorist incidents tend not to correspond to the conventional conception of an armed attack, such as a land invasion or the deployment of one country's military forces against those of another country, where there is an obvious and overwhelming need for a response, and it is clear when and where the attack is occurring. In contrast, terrorist attacks occur with astonishing speed, being over almost on the instant.¹²² However, two basic variations of the classical paradigm have to be addressed. The first is the idea that successive incidents may, when viewed in total, constitute an ongoing armed aggression. In other words, the time that passes between actual terrorist incidents is equivalent to pauses between successive phases of a military campaign; which do not mark the end of the attack, or the removal of the need for self-defence, but are, rather, matters of tactical convenience.¹²³ The second, and closely related, variant on the basic paradigm is the idea of preemption. Since one of the main reasons for these actions is to avert the possibility of similar attacks in the future, the invocation of the right of self-defence can be seen as grounded partly upon the concept of anticipatory self-defence. It can be argued that the actions of the target State evince an intention and capability to perpetrate further attacks. Therefore, it is acceptable for the victim to act to forestall such attacks by removing the capability.¹²⁴ From a legal viewpoint, the "ongoing pattern" and the "preemption" rationales both have the same purpose, which is to make a clear distinction between the use of force against terrorism (defensive reprisal), and illegal retaliation, which it might otherwise be perceived as.¹²⁵

The concept of defensive reprisal against terrorist attacks, thus, seems to be realistic and consistent with the State practice and the Security Council's new legislation on terrorism. This rational and practical concept makes such a balance between the need for the use of force in self-

¹²² Levitt, note 6 *supra*, p 227

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ Ibid

defence against a wrong that has already taken place, as well as against the prospect of a future, although unidentified wrong. In these terms, anti-terrorism actions combined elements of an immediate retribution with a projected application of its right of self-defence.¹²⁶ However, if the defensive reprisal is to be accepted and justified as anticipatory self-defence, there must be clear evidence of the likelihood of future attacks from the same source, albeit at an indeterminate time in the future; otherwise there would be no boundary to the right of self-defence.

The perfect example here is the case of the Al-Qaeda terrorist organization. This organization had made it clear that it was committed to targetting American citizens and interests worldwide (on their homeland and overseas). Al-Qaeda was held responsible for the attacks on US embassies in Kenya and Tanzania in August 1998 and, subsequently, the attacks of 9/11 on Washington and New York. Thus, the notion of the “ongoing pattern” of incidents is fulfilled and the US has every reason to expect further attacks from the same source of aggression. Consequently, whether or not these future attacks are specifically identified, it seems that the US has the right to take defensive action against this organization, its bases, and operatives. The question arose now, however, is the same argument applicable to Iraq? In other words, had Iraq committed itself to attack US citizens and interests or was there an “ongoing pattern” of incidents attributed to Saddam Hussein’s government to suggest that Iraq posed a threat to the US in order to justify defensive action?

The only terrorist attack linked to the government in Baghdad, as illustrated above, was the assassination attempt of President Bush (Senior) in 1993. The question is whether this incident can fulfil the criterion of an “ongoing pattern” and justify the use of force against Iraq in 2003. Remarkably, ever since this occasion, the US has characterized Iraq as a State that sponsors terrorism. However, this incident was the only one to be attributed to the Iraqi government. No

¹²⁶ Kritsiotis, note 39 *supra*, p 167

other terrorist attack, against the US or any other State, has been linked to the government in Baghdad. Even if it accepted that this incident was a sufficient reason for the US to classify Iraq as a State sponsoring terrorism and to expect further attacks from the same source, the US had already responded by attacking the Iraqi Intelligence Headquarters in Baghdad. It cannot use force again after ten years, for the same incident; otherwise, one incident could be used to justify the use of force indefinitely. To conclude, the use of force against Iraq in 2003, at any rate, cannot be linked to or justified on the basis of the incident of 1993.

B.6 State practice after 9/11

B.6.1 The War on Afghanistan (2001) as the first application for the global war against terrorism

On 7 October 2001 the USA, with UK assistance, in pursuit of the parties responsible for the events of 9/11, launched *Operation Enduring freedom* against Afghanistan. The espoused purpose was to destroy the Afghan bases and infrastructures of the Al-Qaeda terrorist organization, and to disrupt the Taliban authorities, who allegedly actively assisted and supported the terrorist organization.¹²⁷

After the beginning of the military action, the US and the UK reported to the Security Council that their action was taken in accordance with their inherent right of individual and collective self-defence. Both States claimed to be acting in response to the terrorist attacks on the World Trade Centre and the Pentagon, in order to prevent further terrorist attacks. In a letter to the Security Council, the US Permanent Representative to the UN, Ambassador John Negroponte, explained the American view. He stated that the US had “obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks...The attacks on 11 September 2001 and the

¹²⁷ Cassese, *International Law*, note 50 *supra*, p 474

ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad”¹²⁸ Thus, in accordance with the new standards of State responsibilities enacted in Resolution 1373, the US and the UK extended the right of self-defence to include the Taliban, since it allowed Al-Qaeda to exist and operate its activities from Afghan soil.¹²⁹

Only Iraq and Iran explicitly challenged the legitimacy of the US military action.¹³⁰ The Security Council, however, explicitly accepted this argument. In a press statement on the same day, the President of the Security Council declared that “the members of the Council were appreciative of the presentation made by the United States and the United Kingdom”¹³¹ As an indicator of the worldwide acceptance and support for the US and the UK action against Afghanistan, many States among them Australia, Canada, Denmark, Estonia, France, Germany, Italy, Netherlands, New Zealand and Norway, participated by sending troops and aircraft after the initial invasion.¹³²

B.6.2 The Israeli attack on Syria 2003

After 9/11 Israel used similar rhetoric to the USA in relation to the war against terrorism, invoking the key notions of global terrorism and harbouring. Israel claims that Hezbollah is a terrorist organization, operating from Lebanon and Syria, and the perpetrators of multiple attacks

¹²⁸ Letter dated 7 October 2001 from the US Permanent Representative to the UN to the President of the Security Council, *UN Doc. S/2001/946*

¹²⁹ Byers, note 69 *supra*, p 408

¹³⁰ Cassese, *International Law*, note 50 *supra* p 474

¹³¹ Statement by the President of the Security Council on 8 October 2001, Press Release, *UN Doc SC/7167*

¹³² See in <[http://en.wikipedia.org/wiki/War_in_Afghanistan_\(2001%E2%80%93present\)](http://en.wikipedia.org/wiki/War_in_Afghanistan_(2001%E2%80%93present))>

on Israeli nationals and armed forces.¹³³ Israel alleges that Lebanon, Syria and Iran have persistently supported Hezbollah, in breach of their obligations to prevent terrorism under Security Council Resolution 1373. Israel accused Syria and Lebanon of providing active assistance to Hezbollah, holding them liable for its actions and legitimate targets of self-defence action by Israel against Lebanon and Syrian bases within Lebanon.¹³⁴ In October 2003, following a Palestinian suicide bombing in a restaurant in Haifa, Israel responded by attacking a site near Damascus in Syria. Syria strongly condemned the attack as an act of aggression and accused Israel of violating international law and the UN Charter.¹³⁵ Israel, however, argued that the action was a legitimate response to Syria's harbouring, training and supporting of terrorists.¹³⁶ Israel claimed that the attack was specifically directed against a Palestinian terrorist training camp for Islamic Jihad and that it warned terrorists not to hide in neighbouring States. The Israeli attack was claimed to be an act of self-defence under Article 51 of the UN Charter and also designed to prevent further Syrian-sponsored terrorist attacks against Israeli civilians.¹³⁷

Whilst most of members of the Security Council, including Pakistan, Spain, Germany, France, Bulgaria, Chile, Mexico, Guinea and Cameroon, condemned the attacks as contrary to international law, the United Kingdom, Russia, Angola, and the United States refrained from such a judgment.¹³⁸ The first three described the attack as "politically unacceptable" but made no pronouncement on its legality, while the United States merely called on Syria to end its support for terrorists.¹³⁹ The UN Secretary-General strongly deplored the Israeli air strike on Syrian territory as well as condemning the preceding terrorist attack.¹⁴⁰ Thus, in reaction to this

¹³³ See *UN Doc. S/2003/96*

¹³⁴ Gray, *International Law and the Use of Force*, note 15 *supra*, p 172-3

¹³⁵ *UN Doc. S/PV.4836*, p 3-4

¹³⁶ *Ibid*, p 5

¹³⁷ *Ibid*, p 7

¹³⁸ Statements by the Representatives of the United Kingdom, *ibid*, p 9, Russia, *ibid*, p 10, Angola, *ibid*, p 12

¹³⁹ Statements by the Representative of the United States, *ibid*, 14

¹⁴⁰ *UN Press Release, SG/SM/8918*, 6 October, 2003

incident, no general support was expressed for a wide right to use force against terrorist camps in a third State.

B.6.3 The war between Hezbollah and Israel 2006

Again in July 2006, after three Israeli soldiers were killed and two captured in a cross-border raid by Hezbollah, Israel responded with air strikes across Lebanon during which more than 7,000 targets were struck, a ground invasion of southern Lebanon, and an air and naval blockade. Meanwhile, Hezbollah launched thousands of rockets into Israel and mounted a guerrilla campaign against the Israeli Army. The Israeli Prime Minister, Ehud Olmert, described Hezbollah's incursions as an "act of war."¹⁴¹ A number of governments, including the United States,¹⁴² United Kingdom, Germany, Australia and Canada,¹⁴³ asserted Israel's right to self-defence. On the other hand, spokespersons from the United Nations, the European Union, the Organization of Islamic Conference, and an assortment of human rights organizations condemned Israel for its disproportionate response to Hezbollah's attacks, although it seems that they accepted Israel's claim of self-defence. The Arab League issued statements condemning both Hezbollah's attack and Israel's response.¹⁴⁴

It seems from the international community's reaction to the Israeli action that the Israeli right of self-defence was accepted. The criticism of the Israeli action focused on the disproportionate use of force, not on the legality of resort to force by Israel. Finally, the Security Council adopted Resolution 1701 calling for "a full cessation of hostilities" from both sides. The Preamble of the resolution "emphasiz[ed] the need to address urgently the causes that have given rise to the

¹⁴¹ "Israelis invade Lebanon after soldiers are seized", *Guardian Unlimited*, (12 July 2006), available at <<http://www.guardian.co.uk/israel/Story/0,,1818696,00.html>>

¹⁴² "President Bush and German Chancellor Merkel Participate in Press Availability" available at <http://www.whitehouse.gov/news/releases/2006/07/20060713-4.html>

¹⁴³ "2006 Lebanon War" available at <http://en.wikipedia.org/wiki/2006_Israel-Lebanon_conflict#_note-98>

¹⁴⁴ Stalinsky, S "Arab World Divided over Hezbollah", *The New York Sun*, (30 July 2007), available at <<http://www.nysun.com/article/36281>>

current crisis, including by the unconditional release of the abducted Israeli soldiers.”¹⁴⁵ Thus, although there is no general agreement on whether the September 11 attacks and its aftermath have created an instant customary law on the issue of terrorism, there are clear indications that the international community is increasingly inclined to accept forcible response against acts of terrorism, even in the absence of the consent of the territorial sovereign.

B.7 Evaluation of State practice after 9/11

The reaction of the world community to the events of 9/11 and the support extended by almost all States to the USA in its war against Afghanistan, coupled with the above-mentioned Security Council new legislation on terrorism, was one that implied a major shift in the legal regime on the use of force, which effectively broadened the notion of self-defence to include non-State actors and States that support or harbour terrorists. Today, it could be argued that the vast majority of States accept such an extension of the notion of self-defence. Besides the war on Afghanistan, the world community's acceptance of the Israeli claim of self-defence in 2006 endorses this argument. This, in turn, strengthens the claim that after 9/11 there is an emerging new customary rule and an authoritative re-interpretation of the Charter with regard to terrorism. The wide rejection of the Israeli attack on Syria on 2003 does not undermine this view. In fact, the rejection of that case seems to be based on the application of this right, not on the legal principle itself. That is, no general consensus has yet been reached on whether the right can be applied against terrorist camps in a third State.¹⁴⁶ Furthermore, it is not clear what scale of terrorist attack can justify military action in response. While the American argument to justify its military response in the case of Afghanistan, that the Taliban regime had allowed Al-Qaeda to exist and operate its activities from Afghan soil, was accepted and massively supported by the world community, exactly the same argument was rejected in the case of Syria 2003. This

¹⁴⁵ Security Council Resolution 1701 of 11 August 2006

¹⁴⁶ Gray. *International Law and the Use of Force*, note 15 *supra*, p 175

apparent inconsistency in the world reaction can be attributed to two main variations in the merits of each case. In the first case, Afghanistan was the main base for Al-Qaeda and the toleration and support for this terrorist organization by the *de facto* government in Afghanistan (Taliban) was clear. In addition, the 9/11 attacks were on a massive scale that certainly can be seen as amounting to an armed attack by a regular army. In the second case, Syria is not the main State-of-residence for Hezbollah and the links between the government in Damascus and Hezbollah are controversial. In addition, the terrorist attacks to which Israel claimed it was responding are obviously incomparable with the 9/11 attacks. In sum, while it is clear that the right of self-defence has been broadened to include terrorists and States that support and harbour them, the exact scope and pre-conditions for exercising this right are still unclear and controversial.

Therefore, until there is clear elaboration on the preconditions of this right, the example of the case of 9/11 and the war on Afghanistan should be narrowly interpreted. This view was held by the majority of States and commentators who expressed concerns as to possible abuse of this right by States.¹⁴⁷ It can be inferred from the world reactions to the cases in the post-9/11 period that accepted action against terrorists and States that harbour them essentially must have the following five pre-conditions; (i) The occurrence of an actual large-scale terrorist attack against the acting State (whether on its territory or against its nationals and interests abroad) with a substantial effect; (ii) tangible evidence as to the strong likelihood of further attacks from the same source in the future; (iii) a clear link between the target State and those responsible for the attack; (IV) the target State's refusal to take action to suppress the terrorist network operates from its soil or to cooperate with the victim State in bringing those responsible to justice; (V) if the terrorist group has links with more than one State, the State chosen as a target for the military

¹⁴⁷ Ibid, p 171-2

action should be the main State-of-residence of the terrorist group. If, however, the terrorists have strong and equal links with more than one State, it seems that the only possible way for the acting State to legitimize its action against more than one State is to seek approval from the Security Council. Otherwise, one terrorist attack can justify military action against unlimited number of States.

Some have argued that Security Council approval is needed in any case, and even against the main State of residence. In other words, the Security Council must have determined the existence of a threat to international peace and security and asserted a right of self-defence.¹⁴⁸ This means that, even after the aforementioned conditions have been fulfilled, ultimately it is for the Security Council to decide whether the target State was in breach of the general legal duty set out in Resolution 1373 and approve the action proposed by the victim State. Of course, this condition will eliminate any possibility of arbitrary exercise of this right; however, it is highly unlikely that States will accept that their proposed action must be approved by the Security Council. In reality, States will prefer to take their own decision and to avoid the possibility that the Council might not authorize the use of force, or that the Council might put some limitations to that force. In other words, a State victim of a terrorist attack will prefer to reserve to itself the right to decide how to use that force, including when and where it should be used.

Applying these pre-conditions to the case of Iraq, surprisingly, one can argue that none of them existed. The only basis for exercising this right against Iraq was the unilateral fact-finding and undisclosed evidence that Saddam Hussein's regime had links with Al-Qaeda, as will be discussed below.

¹⁴⁸ Cassese, A. "Terrorism is also Disrupting some Crucial Legal Categories of International Law", note 66 *supra*, p 1002

Section C: The right of anticipatory self-defence and Bush Doctrine of 'preventive war'

As mentioned in the introduction, the Bush administration claimed that it had the right of preemptive action against threats from Iraq. The legal basis of this argument was the new doctrine of 'preventive war' adopted by the US government in the wake of the events of 9/11, known as 'Bush Doctrine'. The first part of this section will examine the legality of this new doctrine in light of the traditional conditions of the right of anticipatory self-defence. The following part will study the five most notable incidents in State practice in which a claim of preemptive self-defence was made or were widely held by States and writers as examples of anticipatory self-defence. The purpose of examining these cases is to find out how far the world community can accept the Bush doctrine of 'preventive war'.

C.1 'Bush Doctrine' and Webster's formula of anticipatory self-defence

In response to its perception of a fundamentally changed international situation, in 2002 the USA adopted a new *National Security Strategy*. The *Strategy* warned: "while the US will constantly strive to enlist the support of international community, we will not hesitate to act alone if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country."¹⁴⁹ Despite the controversies and divisions between States and writers on the legality of preemptive or anticipatory self-defence under the UN Charter,¹⁵⁰ the Bush Administration asserted that "for centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence

¹⁴⁹ The National Security Strategy of the United States of America, September 2002, available at <<http://www.whitehouse.gov/nsc/nss.pdf>> [Hereinafter National Security Strategy]

¹⁵⁰ See Chapter 1, section E.3

of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.”¹⁵¹

Indeed, the right of anticipatory self-defence has its roots in the just war doctrine of the middle Ages.¹⁵² In the positivist era of international law, the right of anticipatory self-defence was grounded on the formula stated by the American Secretary of State Daniel Webster in the *Carolina* affairs of 1837. In that incident, the British authorities located in Canada destroyed the *Caroline* vessel in a US port, because the *Caroline* had been supplying groups of American nationals engaged in armed revolution in Canada. The United States disagreed with the British government as to the legality of the action, Secretary Webster argued, “While it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”¹⁵³ Thus, whilst the *Caroline* incident evinces that the occurrence of an armed attack is not necessary to justify the exercise of self-defence, it fettered the right of preemptive action with some conditions in order to be legally accepted. According to this formula, preemptive action is only lawful when the danger is imminent in a way that the defending State had no time for deliberation or to choose an alternative course of action. This implies that the danger can be identified credibly, specifically and with a high degree of certainty.¹⁵⁴

The Bush administration, however, was not satisfied with the condition of imminence in Webster’s formula. In discussing the US National Security Strategy, the National Security Adviser, Condoleezza Rice, argued that modern weapons technology demands reconsideration of

¹⁵¹ *National Security Strategy*, note 149 *supra*

¹⁵² See Chapter 1, section E.3, note 196

¹⁵³ Letter from Daniel Webster to Lord Ashburton dated August 6, 1842, quoted in 2 John Bassett Moore, *A Digest of International Law*, 1906, p 412

¹⁵⁴ Franck, “Terrorism and the Right of Self-Defence”, note 69 *supra*, p 841

the concept of “imminence” of a threat.¹⁵⁵ In the view of American administration this condition must be interpreted flexibly and to be adapted “to the capabilities and objectives of today’s adversaries.”¹⁵⁶ The new interpretation of imminence, according to this view, should mean the elimination of the “emerging threats before they are fully formed.”¹⁵⁷ This concept was declared by President Bush in his 2003 State of the Union Address with specific reference to Iraq. He said, “Some have said that we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late.”¹⁵⁸

What the Bush Doctrine implies is that the traditional conditions of anticipatory self-defence and the requirement of clear demonstration of the threatening intentions of the adversary are no longer tenable, since an attack by weapons of mass destruction could be launched at any time, anywhere, without warning. Rather than wait for that to happen or waiting for the last moment which, of course, would reduce the chance of forestalling such an attack, States have the right to use force preventively to eliminate such a threat in its early stage. Thus, the strategy would be better described as “preventive” rather than “pre-emptive”, because the aim is to prevent materialization of generalized threats, rather than to avert an identified, imminent threat.¹⁵⁹

¹⁵⁵ Dr. Condoleezza Rice Discusses President’s National Security Strategy, October 2002, in <<http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html>>

¹⁵⁶ Ibid

¹⁵⁷ Introduction of President Bush to “The National Security Strategy of the United States of America” (Sept. 2002), Section V, in <<http://whitehouse.gov/nsc/nss.pdf>> The Strategy states that the “greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack”. The National Security Strategy of the United States of America (Sept. 2002), Section V, in <<http://whitehouse.gov/nsc/nss.pdf>>

¹⁵⁸ Quoted in Gray, *International Law and the Use of Force*, note 15 *supra*, p 177

¹⁵⁹ Sapiro, M. “Iraq: The Shifting Sands of Preemptive Self-Defence”, 97 *AJIL*, 2003, p 599; Falk, R. “What Future of the UN Charter System of War Prevention”, 97 *AJIL*, 2003, p 598

The Bush Doctrine appears to extend the much-debated doctrine of anticipatory self-defence, to encompass the preclusion of any potential danger even if the threats are uncertain and unidentified. This concept was severely criticized by the overwhelming majority of scholars.¹⁶⁰ Indeed, it is a dangerous concept, since its criteria are ambiguous and it lends itself to the justification of virtually any use of force whether defensive or offensive.¹⁶¹ Certainly, such a concept, free of any limitation, cannot be contained within in any legal theory of self-defence including anticipatory self-defence itself.¹⁶² On this basis, any implementation of this concept will certainly be preserved as illegal.

C.2. Anticipatory self-defence in State practice

C.2.1 The Corfu Channel incident (1964)

The first case in modern history which is frequently cited as proof for the legality of anticipatory self-defence is the *Corfu Channel* incident. In 1946, Albania denied that foreign warships had a right of innocent passage through its territorial waters in the Corfu Strait. In May 1946, Albanian shore batteries fired on two British minesweepers passing through the Strait. In response, in October 1946, the UK sent four warships at action stations to defend its right of passage through the Corfu Channel. The UK claimed not only its right to prepare itself for an armed attack but also the right of anticipatory self-defence when there is a strong possibility of armed attack.¹⁶³ Although there was threat of an imminent danger, the British warships did not attempt to fire on the Albanian shore batteries in a pre-emptive strike, but were only ready to respond to any attack. Initially the UK did not report the situation to the Security Council; however, after its warships were damaged by mines allegedly laid by the Albanians in the Strait, the UK took the matter to

¹⁶⁰ See, for example, Gardner, R. "Neither Bush nor the 'Jurisprudes'", 97 *AJIL*, 2003, p 588; Farer, T. J. "Beyond the Charter Frame: Unilateralism or Condominium", 96 *AJIL*, p 360

¹⁶¹ Gardner, *ibid*

¹⁶² Farer, note 160 *supra*, p 360

¹⁶³ McCoubrey, H. and. White, N. *International Law and Armed Conflict*, Dartmouth, England, 1992, p 92

the Council in 1947. During the debate, the vast majority of States supported the UK. However, the discussion focused on the Albanian alleged mining of the Channel, the concept of anticipatory self-defence was not explicitly addressed. Nevertheless, the wide support for the UK action can be seen as acceptance of the right of anticipatory self-defence where there is strong possibility of future attack, or at least, that a State is allowed to take defensive measures against potential attack including the threat of force. Eventually, the Council did not decide on the dispute and “Recommend[ed] that the United Kingdom and Albania Governments should immediately refer the dispute to the International Court of Justice.”¹⁶⁴

In the *Corfu Channel* case, the Court did not condemn the UK action but only referred to its “show of force” to affirm its right of passage in the channel.¹⁶⁵ The Court held that “the legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law.”¹⁶⁶

Perhaps the Court by using the language “in a manner consistent with requirements of international law” alluded to the conditions of necessity and proportionality of the defensive measures. In a further assertion on these conditions, the Court stated that “In view of the firing from the Albanian battery on May 15th, this measure of precaution [taken by the British authorities] cannot, in itself, be regarded as unreasonable.”¹⁶⁷ The Court concluded, “The Court is unable to characterise these measures taken by the United Kingdom authorities as a violation of Albania’s sovereignty.”¹⁶⁸

¹⁶⁴ Security Council Resolution 22 of 9 April 1947

¹⁶⁵ McCoubrey and White, note 163 *supra*, p 92

¹⁶⁶ *Corfu Channel* case, ICJ Reports, 1949, p 30

¹⁶⁷ *Ibid*, p 31

¹⁶⁸ *Ibid*

The ICJ judgment in this case has been seen as by many writers as a support for the right of anticipatory self defence.¹⁶⁹ It seems, however, that two main reasons were behind the Court's stance. First, the UK was reasonable in expecting danger, simply because of the previous Albanian attack. Second, the action was proportionate to the threat; the UK did not rush to fire on the Albanian shore batteries but was ready to respond. From another point of view, the UK action can be seen as inconsistent with the legal framework of the UN Charter because the British authorities did not take the matter to the Security Council in the first place or otherwise seek peaceful settlement. In conclusion, however, the wide support for the UK action in the Security Council and the non-condemnation by the ICJ could be seen as recognition of anticipatory self-defence in case where there is a strong probability of armed attack provided the proportionality of the response.

C.2.2 The US Quarantine against Cuba (1962)

Another case often associated with the concept of anticipatory self-defence is the US Quarantine against Cuba in 1962. On 22 October 1962, after reviewing newly acquired intelligence, President John F. Kennedy declared that the Soviet Union was building secret missile bases in Cuba, a mere 90 miles off the shores of Florida. As a consequence, he ordered a naval quarantine (blockade) of Cuba to prevent Russian ships from supplying further "offensive missiles" and construction materials to the island.¹⁷⁰ The US government demanded that Russia remove all the missile bases and their deadly contents already installed in Cuba. Significantly, it has been noted that President Kennedy had considered many options, such as an armed invasion of Cuba and air

¹⁶⁹ Brownlie, *International Law and the Use of Force by States*, note 114 *supra*, p 277

¹⁷⁰ Statement of Mr. Stevenson the Representative of the US to the Security Council, SCOR, 1022nd meeting of 23 October 1962, p 3

strikes against the missile sites, but he decided on a less dangerous response; a “pacific blockade.”¹⁷¹

The US perceived the installation of “medium-range ballistic missiles capable of carrying a nuclear warhead”¹⁷² in Cuba as a “threat to the peace”¹⁷³ and “a new phase of aggression”¹⁷⁴ by the Soviet Union, not only towards the US but also to the entire Western Hemisphere, in violation of its obligations under the Article 2(4) of the UN Charter.¹⁷⁵ Subsequently, the US claimed, among other justifications—mainly the Rio Treaty and resolutions of the Consultative Organ of OAS in accordance of regional peacekeeping under Chapter VIII of UN Charter, that the quarantine was justified as a measure of self-defence permitted by Article 51. However, the US did not rely on the concept of anticipatory self-defence. In response, Cuba and the Soviet Union protested the US action and described it as an “act of war in violation of the Charter and the principles of the UN.”¹⁷⁶

In general, the international response divided along the Cold War lines.¹⁷⁷ Western States and their allies supported the action and viewed it as legally and morally justifiable, whereas the Soviet Bloc and socialist States took the opposite view. This division was reflected in the

¹⁷¹ “Pacific blockade” traditionally recognized in international law as constituting a “peaceful method” for settling a dispute as called for by Article 2(3) of the United Nations Charter. By using this word Kennedy hoped to avoid the legal implications of blockade and to emphasize the non-warlike intent of the action.

¹⁷² See Mr. Stevenson’s statement, note 170 supra, p 3

¹⁷³ Ibid

¹⁷⁴ Ibid, p 15

¹⁷⁵ Ibid, p3-4

¹⁷⁶ Statement of Mr. Garcia the Representative of Cuba to the Security Council, SCOR, 1022nd meeting of 23 October 1962, p 24

¹⁷⁷ See letter dated 24 October 1962 from the Republic of Bulgaria to the Secretary-General, *UN Doc. S/5189*; letter dated 24 October 1962 from the Dominican to the Secretary-General, *UN. Doc S/5191*; letter dated 24 October 1962 from Czechoslovakia to the Secretary-General *UN Doc. S/5192*, letter dated 23 October 1962 from the Secretary-General of the OAS to the Secretary-General of the UN, *UN Doc. S/5193*, letter dated 25 October 1962 from the Representative of Hungary to the President of the Security Council *S/5194*, letter dated 25 October 1962 from the Governments of Cameroon, Central African Republic, Chad, Congo, Dahomey, Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal and Upper Volta, addressed to the Secretary-General *S/5195*, letter dated 26 October 1962 from the Representative of Mongolia addressed to the Secretary-General *S/5196*, letter dated 25 October 1962 from the Representative of Haiti addressed to the Secretary-General *S/5198* and *S/5199*, letter dated 30 October 1962 from the Representative of Yugoslavia addressed to the Secretary-General *S/5200*

Security Council discussion. Chile, China, France, Ireland, the UK, and Venezuela supported the lawfulness of the Quarantine. In contrast, Ghana, Romania, and the United Arab Republic (Egypt only without Syria)¹⁷⁸ opposed the action. During the debate, the concept of anticipatory self-defence was not frankly discussed. However, the course of the discussion shows that most of the Members were prepared to accept the pre-emptive use of force under certain circumstances. This can be deduced from the fact that the major subject in the debate was the nature of the missiles installed in Cuba. As summarized by Mr. Aiken, the Representative of Ireland "One of the major points of disagreement...relates to the character and purpose of the large-scale military equipment recently supplied to Cuba by the Soviet Union."¹⁷⁹ Even Cuba and the Soviet Union contended that the missiles were defensive in nature,¹⁸⁰ seemingly giving credence to the argument that if they had been offensive, there might have been some justification for preemptive action.

China, in particular, seemed to accept the right of anticipatory self-defence but in general terms. The Representative of China stated, "In the view of my delegation, measures undertaken to prevent the possibility of war cannot be regarded as acts of hostility, but should be considered as compatible with the Purposes and Principles of the Charter of the United Nations in the preservation of peace and security."¹⁸¹ More obviously, the delegate of Ghana openly accepted Webster's formula of anticipatory self-defence; he asked, "Are there grounds for the argument that such action is justified in exercise of the inherent right of self-defence? Can it be contended that there was, in the words of a former American Secretary of State whose reputation as a jurist in this field is widely accepted, 'a necessity of self-defence, instant, overwhelming, leaving no

¹⁷⁸ The United Arab Republic was established on February 1958 combining of Egypt and Syria under that name, however, Syria disjoined the Union in 1961. Egypt continued to use the United Arab Republic name until the advent of President Sadat and the adoption of its new constitution in 1971

¹⁷⁹ Statement of Mr. Aiken the Representative of Ireland, SCOR, 1023rd meeting of 24 October 1962, p 17

¹⁸⁰ Statement of the Representative of the USSR, SCOR, 1022nd meeting of 23 October 1962, p 30. Statement of the Representative of the Cuba, SCOR, 1022nd meeting of 23 October 1962, p 18

¹⁸¹ Statement of Mr. Liu Chieh the Representative of China, SCOR, 1024th meeting of 24 October 1962, p 5

choice of means and no moment for deliberation’?”¹⁸² The discussion, whilst not indicating unequivocal support for anticipatory self-defence, neither indicates its rejection. Given the absence of specific condemnation of the doctrine, especially by States that opposed the American action, it seems that the idea of anticipatory self-defence in case of imminent danger may have been accepted.

It is interesting that the Bush administration in 2002 repeatedly cited the Cuban Missile Crisis as an example of preemption self-defence. It has been argued that Kennedy’s response to missiles in Cuba was an historical precedent for the right of “preemptive defence”. For example, in a news conference, Secretary of Defence Donald Rumsfeld argued, “Now, what would you call the Cuban Missile Crisis action by President Kennedy...preventing, if you will, the Soviet Union from placing nuclear missiles in Cuba? That was certainly self-defence, it was certainly anticipatory self-defence, it was certainly preventive...he engaged in pre-emption.”¹⁸³ President Bush himself invoked the Kennedy pedigree to bolster the case for the war on Iraq: “As president Kennedy said in October of 1962, neither the United States nor the world community of nations can tolerate deliberate deception and offensive threats on the part of any nation, large or small.”¹⁸⁴

However, this is a misleading analogy. The truth is that President Kennedy ruled out such options as preemptive strike or invasion of Cuba. He worried constantly that a preemptive attack against Cuba might be too dangerous as a first approach to removing the missiles. Indeed, if he had undertaken a preemptive defence strategy, the likely outcome would have been an outright

¹⁸² Statement of Mr. Quaison-Sackey the Representative of Ghana, SCOR, 1024th meeting of 24 October 1962, p 19. Similar observation has been made by Anthony Clark Arend and Beck, note 2 *supra*, p 75

¹⁸³ Quoted in Blight, J and Lang, J, “On the 40th Anniversary, George Bush Hijacks the Cuban Missile Crisis”, *available at* <http://www.brown.edu/Administration/News_Bureau/2002-03/02-027.html>

¹⁸⁴ Ibid

destructive nuclear war.¹⁸⁵ Furthermore, the merits of the Iraqi case in 2003 are completely different from the case of Cuba. In the latter case, the threats posed by Cuba must be seen in the context of the Cold War. In other words, the threat was not caused by tiny Cuba for the Super-Power USA, but by another Super Power; the Soviet Union. As the French delegation stated in the Security Council, "Cuba is not acting alone now...When a small Power places itself at the disposal of a great power and lends itself to offensive military preparations, there can be no doubt that this will imperil world peace, and the international community is therefore entitled to take the matter up."¹⁸⁶ This point indicates that the nature of the threat and the size of the threatening States are major elements in assessing the potential danger.

C.2.3 The Six-Day War

One of the famous examples of anticipatory self-defence is the Israeli attack against neighbouring Arab States in 1967. A few days before the outbreak of the hostilities, Israel reported to the Security Council that Egypt had begun a "massive troop concentration" in the Sinai Peninsula against Israel's southern border. Israel also complained about threats made President Nasser "to interfere with [the Israeli] shipping in the Straits of Tiran."¹⁸⁷ Reciprocally, Egypt notified the Council that it "had received accurate information that Israel had been concentrating huge armed forces on the Syrian border and had every reason to believe that ...the Israeli authorities had seriously contemplated an attack against Syria" and that it had decided to "defend the Arab nation by all measures."¹⁸⁸ As relations deteriorated, Egypt requested the Secretary-General to withdraw the UNEF (which had been in place between Egypt and Israel since 1956), lest they be caught up in the anticipated conflict. Israel, on the other hand, construed

¹⁸⁵ Ibid

¹⁸⁶ Statement of Mr. Seydoux, the Representative of France, SCOR, 1024th meeting of 24 October 1962, p 2

¹⁸⁷ *Repertoire of the Practice of the Security Council 1966-1968*, UN Doc. ST/PSCA/1/Add.5, (1971); see also UN Doc. S/PV.1342, p 41-2

¹⁸⁸ *Repertoire of the Practice of the Security Council 1966-1968*, ibid, p 136

the request for “eviction of UNEF from its position” as a “signal for the revival of belligerence.”¹⁸⁹

On 6th of June 1967, Israel commenced the war against Egypt, Jordan, and Syria by attacking military airports in all the three States, which clearly appeared as a pre-emptive strike. In the Security Council, Israel initially did not depend on anticipatory self-defence. It claimed that Egypt has initiated the attack by shelling Israeli villages in Gaza Strip and the Israeli Defence Forces was only repelling the Egyptian assault “acting in self-defence in accordance with Article 51 of the Charter.”¹⁹⁰ This argument appeared to be false and that the Israeli forces who was responsible for the opening of the hostilities.¹⁹¹ Soon after, the Israeli delegate in the Council claimed that the Egyptian attack was impending. He argued that the expulsion of the UN peace-keeping force, the build-up of Egyptian forces along the frontier and the Egyptian decision to blocking off the Straits of Tiran for passage by Israeli ships¹⁹² amounted to an act of war justifying self-defence under Article 51. Although he kept insisting that Egypt begun the hostilities on the morning 5 June,¹⁹³ as his statement progressed, he appeared to rely more on the anticipatory nature of Israel’s action. Mr. Eban quoted a statement made by President Nasser on 26 May saying that Egypt “intend to open a general assault against Israel. This will be total war. Our basic aim will be to destroy Israel.”¹⁹⁴ Then he went on to say, “the question then widely asked in Israel and across the world was whether we had not already gone beyond the utmost point of danger.”¹⁹⁵

¹⁸⁹ Ibid, p 137

¹⁹⁰ Statement of Mr. Rafael the representative of Israel on the 1347th meeting, 5 June 1967, in the SCOR, p 3-4

¹⁹¹ Statement of Mr. U Thant the Secretary-General of the United Nations, *ibid*, p 2-3

¹⁹² Statement of Mr. Eban the Representative of Israel on the 1348th meeting, 6 June 1967, in the SCOR, p 17

¹⁹³ *Ibid*, p 15

¹⁹⁴ *Ibid*

¹⁹⁵ *Ibid*

The Council's debate focused predominantly, first on the identity of the aggressor and then on the implementation of the cease-fire; it did not discuss the concept of anticipatory self-defence. Nevertheless, some States such as Morocco, Syria and the Soviet Union held the first attack to be a decisive proof in determining the identity of the aggressor. In the words of the USSR Representative, "By launching aggression against neighbouring Arab States, the Government of Israel has defied the United Nations Charter and the elementary rules of international law."¹⁹⁶ Other States such as India, Iraq, Bulgaria and Mali strongly condemned the Israeli action as an act of aggression in violation of international law and the UN Charter, without addressing the concept of anticipatory self-defence. The rest of the Council Members placed no blame on either side and also they did not examine the concept of anticipatory self-defence.¹⁹⁷

Analysis of these discussions reveals that only Israel considered the right of anticipatory self-defence. Notwithstanding the lack of express condemnation of the Israeli pre-emptive action, by most States, none unequivocally expressed support for the doctrine itself. Therefore, the efficacy of anticipatory self-defence remains in doubt. Conversely, the condemnation of the Israeli action by some States, and their apparent stance that the first to strike is the aggressor, their position cannot be taken as clear consensus opposed to anticipatory self-defence, because it was linked to their political posture.

C.2.4 The Israeli strike on the Osiraq nuclear reactor (1981)

This incident requires some examination in detail by virtue of its being the only precedent in the State practice that seems to echo the Bush Doctrine of "preventive self-defence" and resembles the action taken against Iraq in 2003. Similar to the case of the present study, the Israeli strike on Iraq's nuclear reactor in 1981 focused on eliminating an intangible possible threat, long before it

¹⁹⁶ Statement of Mr. Fedorenko the Representative of the USSR, *ibid*, p 6

¹⁹⁷ See Statements of the Representatives of Argentina, *ibid*, p 6, Brazil 7, Canada 7, China 9, Denmark 10, Ethiopia 3, France 4, Japan 8, the UK 4 and the US 11

was fully formed; in other words, to incapacitate the enemy, despite the absence of any reasonably-assessed imminent danger.

In June 1981, perhaps perceiving that its preemptive action in 1967 was not condemned, Israel sought to rely, this time explicitly, on the same doctrine. Israel launched an air raid against an Iraqi nuclear reactor (under construction) invoking its right of anticipatory self-defence. Israel argued that the reactor was intended for the production of nuclear weapons which would be directed at Israel, and therefore constituted a threat to the existence of the State of Israel. Therefore, under no circumstance would Israel allow an enemy to develop weapons of mass destruction. In assertion of this ideology, the Israeli Premier, Mr. Begin, announced that if Iraq tried to rebuild the reactor, Israel would destroy it again.¹⁹⁸ In the Security Council, Iraq strongly condemned the strike as an unequivocal “act of aggression”¹⁹⁹ and demanded that “mandatory sanctions in accordance with the provisions of Chapter VII of the Charter should be imposed upon Israel.”²⁰⁰ The vast majority of States supported Iraq’s view.

On the other hand, the Israeli delegate, Mr Bulm, claimed that Israel’s action was justified as an act of self-defence. He stated that “in destroying Osiraq, Israel performed an elementary act of self-preservation, both morally and legally. In doing so, Israel was exercising its inherent right of self-defence as understood in general international law and preserved in Article 51 of the United Nations Charter. A threat of nuclear obliteration was being developed against Israel by Iraq, one of Israel’s most implacable enemies.”²⁰¹ In support of the permissibility of the right of anticipatory self-defence, the Israeli representative referred to writers who advocated the right of

¹⁹⁸ Quoted in the Statement of Mr. Saadoon Hammadi the Representative of Iraq on the 2280th meeting, 12 June 1981, SCOR, p 3

¹⁹⁹ Ibid, p 7 at 48

²⁰⁰ Ibid, p 7 at 52

²⁰¹ Mr. Bulm referred to views of Sir Humphrey Waldock, Professor Morton Kaplan and Professor Derek Bowett. See Statement of Mr. Blum the Representative of Israel on the 2280th meeting, 12 June 1981, SCOR, p 8

anticipatory self-defence.²⁰² All delegates in the Council, however, rejected the Israeli claim and condemned the action on the basis that there was no immanent danger. The reactor was under construction and not able to produce nuclear weapons; in addition, it was designed for peaceful purposes and monitored by the International Atomic Energy Agency (IAEA) which declared that Iraq had fully complied with its obligations under the Non-Proliferation Treaty.²⁰³ Mindful of these facts, the Security Council unanimously condemned Israel's action as a violation of the Charter.²⁰⁴

As to the concept of anticipatory self-defence *per se*, some States including Ireland, Guyana, Philippines, Romania, Syria, and Yugoslavia²⁰⁵ expressed the view that self-defence under Article 51 is only permitted "if an armed attack occurs."²⁰⁶ The Syrian delegate said that anticipatory self-defence is "a concept that has been refuted time and again in the Definition of Aggression and dismissed as unacceptable, since it usurps the powers of the Security Council as set forth in Article 39 of the Charter and curtails the Council's authority."²⁰⁷ Similarly, the Guyanese Representative stated that "nowhere does [Article 51] provide for the use of the preemptive strike, which is contrary to the spirit of the Charter and to the purposes and principles of the Organization."²⁰⁸ The delegate of Romania described the notion of "preventive war" as

²⁰² Ibid, p 11

²⁰³ The Director General of IAEA, in his statement to the Board of Governors, stated that "The Agency has inspected the Iraqi reactors and has not found evidence of any activity not in accordance with the Non-Proliferation Treaty." Quoted in Mr. Saadoon Hammadi's statement, note 204, *supra*, p 7, at 49

²⁰⁴ Resolution 487 of 19 June, 1981

²⁰⁵ The Yugoslavian delegation argued that "the absurd and particularly dangerous argumentation concerning the right of preventive attack in self-defence must be rejected because not to reject it would be to open the way to lawlessness and to legalize aggression. If such argumentation were even partly endorsed, no country would be safe. Force would become the law that any powerful country could take into its own hands on the basis of subjective appraisal of the existence of an alleged danger threatening its security." Statement of Mr. Komatina the Representative of Yugoslavia on the 2283rd meeting, 15 June 1981, SCOR, p 5, at 46

²⁰⁶ Statement of Mr. El-Fattal the Representative of Syria on the 2284th meeting, 16 June 1981, SCOR, p 6, at 65

²⁰⁷ Ibid, at 66

²⁰⁸ Statement of Mr. Sinclair the Representative of Guyana on the 2286th meeting, 16 June 1981, p 6, at 65

“totally unacceptable for reasons which relate both to an elementary respect for international morality and law.”²⁰⁹

Opposite to this restricted interpretation of Article 51, many States expressed the view that anticipatory self-defence is only permissible in case of imminent danger, and some of them, recited Webster’s conditions of this right. However, they rejected the Israeli action because these conditions were not met in the Oziraq case. Among those States are Algeria, Niger, Malaysia, Sierra Leone and the UK. The delegate of Sierra Leone stated that “the plea of self-defence is untenable where no armed attack has taken place or is imminent.”²¹⁰ He went further to say, “As for the principle of self-defence, it has long been accepted that, for it to be invoked or justified, the necessity for action must be instant, overwhelming and leaving no choice of means and no moment for deliberation.”²¹¹ Webster’s conditions of anticipatory self-defence were similarly invoked by Sir Anthony Parsons, the delegate of the UK. He condemned the attack as “grave breach of International law” because there was “no instant or overwhelming necessity for self-defence.”²¹² Mr. Oumarou, the Representative of Niger, stated that Israel’s “reference to Article 51 of the Charter is not merely abusive but also misleading. In this case, there was no legitimate self-defence; there was aggression, because Israel was in no way facing an imminent attack.”²¹³ Hence, it seems that those States upheld the doctrine of anticipatory self-defence under the conditions evinced in the Carolina incident and their only reason for opposing the Israeli strike was that these conditions were not met. Other States, such as Ireland²¹⁴ and Jordan, rejected the Israeli claim of self-defence because it did not first have recourse to the Security Council. The

²⁰⁹ Statement of Mr. Marinescu the Representative of Romania on the 2281st meeting, 13 June 1981, p 12, at 117

²¹⁰ Statement of Mr. Koroma the Representative of Sierra Leone on the 2283rd meeting, 15 June 1981, p 14, at 147

²¹¹ Ibid, at 148

²¹² Statement of Sir Anthony Parsons the Representative of the UK, *ibid.* p15

²¹³ Statement of Mr. Oumarou the Representative of Niger on the 2284th meeting, 16 June 1981, p 2, at 11

²¹⁴ Statement of Mr. Dorr the Representative of Ireland on the 2283rd meeting, 15 June 1981, p 3

Delegate of Jordan stated that Israel in its reliance Article 51 forgot that "it is not an isolated article; it comes after a series of other articles, all of them referring to actions by the Council."²¹⁵

Many other States such as Egypt, Sudan, Kuwait, Cuba and Zambia condemned the Israeli action without explicitly addressing the doctrine of anticipatory self-defence. As to the US, its representative, Ambassador Kirkpatrick, condemned the action also without addressing the issue of the legality of anticipatory self-defence. However, she pointed out that the condemnation was based on Israel's failure to exhaust peaceful means for the resolution of the dispute before resorting to force. Thus, it can be deduced from this posture that the US shared the Israeli concept of preventive self-defence.

In fact, this was the only case in which such a large number of States (more than forty-five delegates spoke before the Council) expressed views on the doctrine of anticipatory self-defence. It would therefore seem to be a reasonable reflection of the attitudes of States towards both the doctrine of anticipatory self-defence and the concept of "preventive self-defence". The debate suggests that, while a few States rejected the idea of anticipatory self-defence, the majority considered it permissible in case of imminent danger and according to Webster's formula. Even some of those States who rejected the permissibility of pre-emptive strike under Article 51, in fact, seemed focus on the notion of "preventive war," not anticipatory self-defence. For example, the representative of Ireland, in his rejection of the doctrine of anticipatory self-defence, stated, "Israel has argued that, in an age of massive and dangerous weapons, [the right of self-defence] must be extended to include imminent attack. But the present claim goes well beyond this. It starts with the assertion that, despite evidence to the contrary, Iraq's nuclear programme will result in the secret development of a bomb within three to five years; through a further extrapolation it asserts that Iraq will use the bomb, once developed, with immense damage to

²¹⁵ Statement of Mr. Nuseibeh the Representative of Jordan on the 2280th meeting, 12 June 1981, p 22, at 224

Israel and its people; and it concludes that an immediate strike to eliminate that possible future danger is fully justified under Article 51.”²¹⁶ To conclude, this case indicates for certain that there is a unanimous rejection for the concept of “preventive war” which focuses on eliminating the threat before it is fully formed.

C.2.5 The US shooting of Iranian civilian aircraft (1988)

In July 1988, the USS Vincennes shot down an Iranian civilian Airbus Flight 655 during the Iran/Iraq war. The USA argued that its action was part of an ongoing battle and that it was engaged in a response to an armed attack by Iran.²¹⁷ The Iranian military aircraft was fired on a helicopter from the USS Vincennes after it had been blocked in by Iranian patrol boats.²¹⁸ Consequently; the USS Vincennes exercised its right to self-defence and fired at what it believed to be a hostile Iranian military aircraft, after sending frequent warnings.²¹⁹

In the Security Council, the US argued that it has exercised its right of self-defence under Article 51 in response to an attack by Iran, however, and it did not expressly rely on anticipatory self-defence.²²⁰ Nevertheless, Iran argued that Article 51 does not permit pre-emptive self-defence and that the US action was aggressive. Many other states agreed with Iran in its argument, however, they did not reject the concept of anticipatory self-defence. The UK, on the contrary, supported the US action in general terms, but did not clearly support the principle of anticipatory self-defence.²²¹

²¹⁶ Statement of Mr. Dorr the Representative of Ireland, note 214 *supra*, p 3, para 26

²¹⁷ SCOR, 2818th Meeting, *UN Doc. S/19989*; see also 42 *UNYB*, 1988, p 199

²¹⁸ There was a series of recent incidents between the US and Iraq. For example, on October 16, 1987, an Iranian missile hit a US vessel, a re-flagged Kuwaiti tanker, in Kuwaiti territorial waters. Two days later, the US attacked an Iranian oil platform. See chapter 2, section B.2

²¹⁹ SCOR, 2818th Meeting, *UN Doc. S/19989*

²²⁰ Although the US did not invoke anticipatory self-defence in the Security Council’s debate, this was clearly its policy of the use of force. After Iraq’s accidental attack on *USS Stark* on 17 May 1987, the US issued new rules of engagement for its forces in the region. These rules included that “aircraft of either country [Iran and Iraq] flying in a pattern which indicates hostile intent will be fired on unless they provide adequate notification of their intentions.” Thus, it was clear the US government adopted anticipatory self-defence as tactical. 26 *ILM* (1987), p 1422

²²¹ SCOR, 2818th Meeting, *UN Doc. S/19989*

B.6 Summary of State practice

Some leading writers, such as Antonio Cassese and Christine Gray,²²² after examining these incidents, drew the conclusion that the vast majority of states reject the concept of anticipatory self-defence and do not see it as legal under the UN Charter. Cassese, for example, argued that “analysis of State and UN practice shows that the overwhelming majority of States firmly that anticipatory self-defence is not allowed by the UN Charter.”²²³ However, this view can be disputed. A thorough examination for discussions in the Security Council clearly indicates that the majority of States view anticipatory self-defence as lawful and consistent with the Charter legal framework in case of imminent danger and under the conditions evinced in the Carolina incident. Indeed, it cannot be concluded, at any rate, that the majority of States believe that anticipatory self-defence in case of imminent danger is unlawful. Only a few States seemed to be convinced that self-defence is only permitted “if an armed attack occurs.” Even those views were mostly expressed in the context of Israel’s strike on the Iraqi nuclear reactor which, in fact, was a “preventive” not “anticipatory” action. Therefore, one may dispute the credibility of these views because they were expressed regarding an action taken under the guise of anticipatory self-defence, not the concept *per se*. Even though it can be accepted that there is no clear-cut consensus over the permissibility of anticipatory self-defence, there is no ground in States’ reactions to sustain the opposite view. Furthermore, if, as suggested, the majority of States reject anticipatory self-defence, the Security Council or the General Assembly would have expressed this view clearly as it did regarding armed reprisals. In sum, States’ views expressed in those incidents support the view reached in the Opening Chapter, that anticipatory self-defence against imminent and clearly identified danger is lawful under Article 51.

²²² Gray, *International Law and the Use of Force*, note 15 *supra*, p 129-33

²²³ Cassese, *International Law*, note 50 *supra*, p 361

On the other hand, States' reactions to these episodes suggest that a clear distinction must be made between anticipatory self-defence and the notion of "preventive war". As demonstrated in the case of Israel strike on the Iraqi nuclear reactor, there was unanimous rejection of such a doctrine. This doctrine, based on incapacitating the enemy and preventing him attaining or maintaining a level of power considered threatening, cannot be classified under any defensive paradigm. Rather, it is an offensive policy in the guise of defence and justified by extrapolation and unreasonable expectation for the future.

**Section D: the validity of the invocation of the right of self-defence against Iraq
in 2003**²²⁴

As previously mentioned, the US claimed that they had the right of self-defence in pre-emptive action against threats from Iraq. In his Address to the Nation on Iraq, President Bush summarized the threats posed by Iraq in the following terms: "Intelligence gathered by this and other governments leaves no doubt that the Iraq regime continues to possess and conceal some of the most lethal weapons ever devised. This regime has already used weapons of mass destruction against Iraq's neighbours and against Iraq's people. The regime has a history of reckless aggression in the Middle East. It has a deep hatred of America and our friends. And it has aided, trained, and harbored terrorists, including operatives of Al Qaeda. The danger is clear: using chemical, biological or, one day, nuclear weapons obtained with the help of Iraq, the terrorists could fulfil their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country or any other. The United States of America has the sovereign authority to use force in assuring its own national security."²²⁵

²²⁴ The view represented in this section is regarding the legality of the justification of self-defence as a legal ground for the invasion. It does not, however, extend to the other legal grounds invoked by the US and the UK presented in the preceding chapters.

²²⁵ President Bush's Address to the Nation on Iraq, 39 Weekly Comp. Press. Doc. 338-39

Thus, Saddam Hussein's government allegedly posed two kinds of threats towards the US: first, the possibility of Iraq's sponsoring, supporting, or harbouring terrorists, possibility even providing them with WMDs; second, the prospect of a direct attack, by one of Iraq's official organs, against the US (whether on its homeland or abroad, i.e. the US troops stationed in the Middle East). The credibility of these two possibilities will be assessed respectively.

D.1 The use of force against Iraq's threats of terrorism

The USA in its letter to the Security Council under Article 51 at the start of *Operation Enduring Freedom*, having asserted its right to act in self-defence in response to 9/11, went on to say "There is much we do not know. Our inquiry is still in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States."²²⁶

President Bush also on several occasions broadened the focus of the war against terrorism beyond Afghanistan.²²⁷ It is not entirely clear whether the USA anticipated military action only against those directly responsible for the attacks of 9/11 or whether it was extending the scope of the right of self-defence in the war against terrorism, to pre-empt potential future threats.²²⁸ In neither case, however, would the use of force in self-defence be legitimate.

If the US contemplated action against general threats of terrorism not related to the atrocities of 9/11, its claim of self-defence is clearly unacceptable and illegal. As mentioned above, although it is admitted that the right of self-defence has been broadened to include terrorists and States that support and harbour them, this right is subject to certain conditions, importantly, that an act of terrorism has already occurred and that there are more acts to be expected from the same source, in the sense that the action cannot be anticipatory or without precedent. No terrorist attack has occurred against the US since the 9/11 attacks.

²²⁶ UN Doc. S/2001/946

²²⁷ See, for example, President Bush's State of the Union Address, January 2002.; see also President Bush News Conference on 6 March 2003, 39 Weekly Comp. Pres. Doc. 295, 296 (6 March 2003)

²²⁸ Gray, *International Law and the Use of Force*, note 15 *supra*, p 175

As regards States claimed to harbour and protect Al-Qaeda, which perpetrated the 9/11 attacks, again the US justification of self-defence is not valid. Neither the US nor the UK has ever disclosed any evidence of links between Al Qaeda and President Saddam Hussein, nor was any such link known to the international community. Furthermore, as mentioned above, Iraq was not mentioned in the findings of the massive investigations carried out by the US and the UK intelligent agencies. Even after the beginning of the *Operation Enduring Freedom* against Afghanistan, in August 2002, when the US Commander of the *Operation Enduring Freedom* announced the possibility of further operations in neighbouring countries where Taliban and Al-Qaeda fighters were thought to be hiding,²²⁹ Pakistan was singled out, but it was not suggested that Al-Qaeda operators may have fled to Iraq.

The repeated assertions made by the US and the UK of ongoing links between Al-Qaeda and President Saddam Hussein and the prospects of future attacks, were made unilaterally and appeared immediately before the invasion. They were obviously intended to bring any attack on Iraq within the scope of the war against terrorism and to enhance the case for war,²³⁰ especially, among the American and British publics. It seems reasonable to suggest that if there had been was any significant link, at all, between Al-Qaeda and Saddam Hussein, the US and the UK would have disclosed their evidence in order to enhance their legal grounds for action against Iraq. Notably, in the run up to the war, when the US Secretary of State, Colin Powell, in his presentation in the Security Council disclosed evidence based on U.S. intelligence information regarding Iraq's efforts to pursue WMD and missile programmes and conceal them from UN inspectors,²³¹ it could be asked why he did not reveal the intelligence information regarding Iraq's links with the Al-Qaeda to strengthen the case for the use of force.

²²⁹ Ibid, p 169

²³⁰ Ibid, p 180

²³¹ *UN Docs S/PV 4701 and S/PV 4714 (2003)*

Even if there was evidence for this link, the action would again be unacceptable if not approved (explicitly or implicitly) by the Security Council.²³² For the US to further select a third State as target of its military action in response for the 9/11 attacks is contrary to the seemingly acceptable pre-conditions of the right of self-defence against terrorists and States that harbour. As shown in the case of the Israeli attack against Syria in 2003, the action was condemned because the targeted State was a third State not the main State of residence of Hezbollah (Lebanon). If the US had been attacked by five or six States, it might legitimately have claimed a right to respond with force against all States which participated in the aggression. However, this was not the case. The 9/11 events were committed by a non-state organization, which might operate from several countries, which could be difficult to identify, and could be involved to varying degrees.²³³ The Iraqi case was not like that of Afghanistan, where there was convincing evidence that it was the base of the terrorist organization responsible for the attacks. Afghanistan's long history of harbouring the Al-Qaeda on its territory, tolerating their activities and refusing to cooperate with the international community to apprehend the terrorists could be considered to make it a legitimate target.²³⁴

D.2 Threats of attack by WMDs

Although the US National Security Strategy is focused primarily on the disruption and destruction of terrorist organizations before they carried out attacks against the US, this goal has been connected with another one, which is to eliminate the threats posed by possession of weapons of mass destruction by its enemies.²³⁵ In other words, the US broadened its goal to include States that possess or develop weapons of mass destruction. The Bush administration

²³² The argument here is regarding the use of force against Iraq as a State that supported Al-Qaeda, not in relation to Iraq's non-compliance with its disarmament obligations

²³³ Falk, "What Future of the UN Charter System of War Prevention", note 159 *supra*, p 592; Cassese, A. "Terrorism is also Disrupting some Crucial Legal Categories of International Law", note 66 *supra*, p 999-1000

²³⁴ *Ibid*, p 999

²³⁵ Gray, *International Law and the Use of Force*, note 15 *supra*, p 176

created such linkage between States developing weapons of mass destruction, Iraq, Iran and North Korea being specifically mentioned in this regard, and terrorists, in order to justify an extension of the right of self-defence to include the concept of “preventive self-defence” against enemy States. Indeed, he seems to have extended the ‘war against terrorism’ and the legitimacy conferred by the world community and the Security Council for that war, beyond its original goal.²³⁶

Supporters of the American argument of self-defence contend that, from the perspective of the new understanding of anticipatory self-defence, use of force against Iraq was justified by the threat of a WMD attack by Iraq, either directly or through Iraq’s support for terrorism. They characterize the threat as “sufficiently imminent” to necessitate military action.²³⁷ In this connection it has been argued that since there is no specific definition of the term “imminent” in international law to provide a clear criterion for the legitimate use of force in anticipatory self-defence, it is necessary to consider also the likelihood that the threat will materialize and the severity of the harm likely to result. With the development of nuclear and other sophisticated weapons, the potential magnitude of the danger is greatly increased, while the relevance of timing is reduced.²³⁸ Furthermore, proponents of this view argue that *Operation Iraqi Freedom* must be read in the context in which it took place, including Iraq’s open aggression against neighbouring States, its possession of weapons of mass destruction, its record of deployment of such weapons, the Security Council action under Chapter VII, and Iraqi intransigence in the face of the Council’s requirements.²³⁹ In light of this background of the Iraqi regime, the force used was proportionate to the threat posed by Iraq, since it was limited to what was necessary to

²³⁶ Ibid, p 176-7

²³⁷ Yoo, J. “International Law and the War in Iraq”, 97 *AJIL*, 2003, p 574; see also Sapiro, note 159 *supra*, p 604

²³⁸ Yoo, *ibid*, p 572-4

²³⁹ Taft, W.& Buchwald, T. “Preemption, Iraq, and International Law”, 97 *AJIL*, 2003, p 557-8

remove the threat, including the destruction of Iraq's WMD capability and the removal of Saddam Hussein, the originator of the Iraqi threat.

Even if it agreed that the concept of imminence must include an analysis beyond the temporal proximity of a threat, to include the probability that the threat will occur, however, it is questionable whether the facts of the situation that existed in March 2003 correspond to any reasonable theory of imminence or probability of occurrence. Regardless the fact of Iraq's non-compliance with its disarmament obligation and the shortcomings in Iraqi cooperation which justifies the invasion on other legal grounds, at the time of the invasion, UN and International Atomic Energy Agency inspectors were deployed in Iraq, undertaking search for WMDs.²⁴⁰ In a meeting of the Security Council on 14 February 2003, Hans Blix pointed out the shortcomings in Iraq's cooperation, but also admitted that inspectors had conducted several inspections in the previous three months.²⁴¹ Their reports provide no evidence to support the assertion that Iraq intended imminent aggression against anyone. As correctly expressed by Franck, "Whatever the inspectors did or did not learn about Iraqi WMDs, nothing in their reports lends any credibility to the claim of an imminent threat of armed aggression against anyone."²⁴² In sum, the facts of situation at the time of the invasion definitely did not support the case of preemption, as there was neither imminence nor necessity.²⁴³ President Bush seemed to acknowledge that the alleged threats posed by Iraq WMDs were not imminent. In his ultimatum to President Saddam Hussein on 17 March 2003, he stated "In 1 year, or 5 years, the power of Iraq to inflict harm on all free nations would be multiplied many times over...We choose to meet that threat now, where it

²⁴⁰ Franck, T. "What Happens Now? The United Nations after Iraq", 97 *AJIL*, 2003, p 611

²⁴¹ Murphy, S. "Use of Military Force to Disarm Iraq", 97 *AJIL*, 2003, p 422

²⁴² Franck, note 240 *supra*, p 611

²⁴³ Falk, "What Future of the UN Charter System of War Prevention", note 159 *supra*, p 598

arises, before it can appear suddenly in our shies and cities.”²⁴⁴ This statement implies that there was no immediate threat to justify the use of force in a preemptive strike.

In fact, the US frankly adopted a policy similar to the one adopted by Israel in 1981. Despite the overwhelming condemnations for the Israeli missile strike against the Iraqi nuclear reactor, the Bush administration referred to this incident as a precedent to support the legitimacy of the preventive doctrine. The legal Advisor of the US Department of State argued that “the President’s National Security Strategy relies upon the same legal framework applied to the British in Carolina and to Israel in 1981...After the exhaustion of peaceful remedies and a careful, deliberate consideration of the consequences, in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm.”²⁴⁵

The UK, however, was more cautious in its formal justification of the invasion. The UK took the position that the legal basis of the *Operation Iraqi Freedom* was a revival of the Coalition’s right to use force against Iraq’s material breach of the cease-fire Resolution 687.²⁴⁶ Remarkably, in his memorandum to British Government over the possible legal basis for the use of force, the Attorney General of the United Kingdom, while supporting the right to use force, rejected the US doctrine of “preventive self-defence.” Lord Goldsmith wrote, “I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in

²⁴⁴ President Bush Address to the Nation on Iraq 17 March, 2003, 39 Weekly Comp. Pres. Doc. 338, 340 (24 March 2003)

²⁴⁵ Taft, W. Legal Advisor of the US Department of State, “The Legal Basis for Preemption”, 18 November 2002, *available at* <<http://www.cfr.org/publication.php?id=5250>>

²⁴⁶ “Memorandum by the Foreign and Commonwealth Office, Iraq: Legal Basis for the Use of Force”, 17 March 2003, 52 *ICLQ*, p 812-4; *available also at* <<http://www.ico.gov.uk/cms/documentuploads/annex>>

my opinion, exists or is recognized in international law.”²⁴⁷ Thus, even the leading partner of the US in the Coalition against Iraq refused to rely on such a doctrine.

It seems that later, the US realized that its argument of preemptive self-defence was untenable under international law and the UN Charter. In its letter to the Security Council after the beginning of the *Operation Iraqi Freedom*, the US relied solely on the basis of Security Council Resolutions 678 and 687 and no mention was made of the right of preemptive self-defence. The US stated, “The actions being taken are authorized under existing Council resolutions, including its Resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the cease-fire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the cease-fire and revives the authority to use force under Resolution 678 (1990). This has been the basis for the coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General’s public announcement in January 1993 following Iraq’s material breach of Resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to Resolution 678 (1990).”²⁴⁸

In fact, the argument of preemptive self-defence is not only unacceptable, but also contradicts the argument that the use of force was in response to Iraq’s violations of the cease-fire. To argue that the US and the UK undertook pre-emptive self-defence against threats from Iraq in 2003 implies that this episode was a fresh war, not a resumption of the hostilities as a result of Iraq’s non-compliance with its disarmament obligations under the cease-fire Resolution 687. As Dinstein correctly observed, “There is absolutely nothing preemptive about the resumption of hostilities

²⁴⁷ Lord Goldsmith, the UK Attorney General, “Memorandum on the legality of military action against Iraq”, available at <<http://www.ico.gov.uk/upload/documents/library/>>

²⁴⁸ Letter dated 20 March 2003 from the Permanent Representative of the United States to the President of the Security Council, *UN Doc. S/2003/351*

when a cease-fire disintegrates.”²⁴⁹ Furthermore, the state of war between the Iraq and the Coalition continued notwithstanding suspension of the major operations in 1991. Finally, even the US Legal Advisor for the Department of State, who previously supported the doctrine of preventive war, after the beginning of *Operation Iraqi Freedom*, conceded that this justification cannot be a valid justification for the invasion of Iraq on its own, but must be seen in the context of Security Council Resolutions 678 and 687. He commented: “Was *Operation Iraqi Freedom* an example of preemptive use of force? Viewed as the final episode in a conflict initiated more than a dozen years earlier by Iraq’s invasion of Kuwait, it may not seem so.”²⁵⁰

Conclusion

The events of 9/11 and their aftermath have brought a fundamental reappraisal of the legal rules governing the use of force in self-defence, and broken new ground in international law as to the use of force against terrorism. The almost universal support of the world community for a US right of self-defence in response to 9/11, coupled with the Security Council’s new legislation on terrorism may be seen as broadening the right of self-defence to include non-State actors and States that support or harbour terrorists. Indeed, today, the world has reached a situation where there is general consensus among the international community that terrorism must be absolutely condemned. Many international conventions and Security Council resolutions indicate that not only the terrorist networks themselves have to be suppressed, but also all actors, including State actors, which support the infrastructure or the financing of these organisations or even, provide them safe havens. This general consensus among most of the world States is “weighted with the terminology of opinion juris” and “deliberately norm creating.” However, there are many problems associated with this extension of the right of self-defence, regarding its exact scope and

²⁴⁹ Dinstein, Y. *War, Aggression and Self-Defence*, fourth edition, Cambridge University Press, Cambridge, 2005 p 297

²⁵⁰ Taft and Buchwald, “Preemption, Iraq, and International Law”, note 239 *supra*, p 563

the pre-conditions for exercising it. Therefore, the example of the case of 9/11 and the war on Afghanistan should be narrowly interpreted. The world States' reactions to the cases in the post-9/11 period indicate that they accept the application of this right only under certain conditions, essentially, when there is large-scale terrorist attack, the target State has an obvious link with the terrorist group, and there is tangible evidence that future attacks from the same source of aggression are almost certain. Furthermore, States' reactions to the Israeli attacks on Syria in 2003 clearly show a general reluctance to accept military action against terrorist camps in a third State.

The Bush administration, however, exploited the rhetoric of the 'war against terrorism' and the legitimacy conferred on it by the world community and the Security Council, far beyond its original goal, to adopt a doctrine of preventive self-defence, indicating that force may be used even where there has been no actual attack—contrary to all State practices in this regard before and after the 9/11 events. Furthermore, the US administration extended the scope of this alleged right beyond the original goal of combating terrorism, to include States that possess or develop weapons of mass destruction and the US administration perceived them as growing enemies. That doctrine, obviously, cannot be contained within any legal theory of self-defence including anticipatory self-defence and had previously, in 1981, been vigorously rejected by the overwhelming majority of States. Again, the "Bush Doctrine" has been rejected by the majority of States and commentators, even those who supported the use of force against Iraq in 2003, including the UK, the leading partner of the US. Therefore, the invasion of Iraq cannot be justified on the ground of this controversial and dangerous concept, which would allow a virtually unfettered right of self-defence. Indeed, taking a wider view, it is not in the interest of the world community, including the US itself, to develop a doctrine that permits every nation to

act in prevention against its own definition of threats to its security.²⁵¹ The US policymakers appear not to have considered that acceptance of such doctrine could justify the use of force against its own interests, for example, by China against Taiwan, North Korea against South Korea, Russia against the former USSR countries in Eastern Europe and beyond.

²⁵¹ Kissinger, H. "Consult and Control: Bywords for Battling the New Enemy", *Washington Post*, 16 September 2002

Chapter 8

The 'Right' of Pro-Democratic Intervention

Introduction

The last justification put forward for the invasion of Iraq is to relieve the Iraqi people of vast and continuing human rights violations by the despotic regime of Saddam Hussein. President Bush, in his justification of the invasion, asserted the need for regime change in Iraq. He promised to “free the Iraqi people”¹ by replacing Saddam Hussein’s vicious regime with a democratic one. This justification characterized the invasion, partly, as pro-democratic. Indeed, it is a well-documented fact that Saddam Hussein was a brutal dictator who committed serious violations of human rights and remained in power against the will of the Iraqi people. However, the question is to be considered whether any international legal instrument permits intervention to maintain or impose a democratic form of government in another State.

In recent years, there has been considerable literature arguing that there is a newly emerging ‘law’ which permits States to use force unilaterally to overthrow despotic regimes in other countries, notwithstanding their sovereignty.² It has been argued that modern international law has installed a major imperative for pro-democratic intervention: internationally guaranteed human rights.³ It was also suggested that pro-democratic intervention is legally justified under the UN Charter and Article 2(4) must be interpreted in a way legitimizes such an action.⁴ On the

¹ President Bush’s Radio Address at the beginning of *Operation Iraqi Freedom*, in <<http://www.whitehouse.gov/news/releases/2003/03/20030322.html>>

² See Reisman, M. “Coercion and Self-Determination: Construing Charter Article 2 (4)”, 78 *AJIL*, 1984; D’Amato, A. “The Invasion of Panama Was a Lawful Response to Tyranny”, 84 *AJIL*, 1990; Halberstam, M. “Copenhagen Document: Intervention in Support of Democracy”, 34 *Harvard ILJ*, 1993; and Kirkpatrick, J. and Gerson, A. “The Reagan Doctrine, Human Rights, and International Law”, in Louis Henkin (ed), *Right v. Might, International Law and the Use of Force*, Council on Foreign Relations Press, London, 1989

³ Reisman, M. “Why Regime Change is (Almost Always) a Bad Idea”, 98 *AJIL*, 2004, p 516

⁴ Reisman, “Coercion and Self-Determination: Construing Charter Article 2 (4)”, note 2 *supra*, p 643-4; see also D’Amato, note 2 *supra*, p 520

other hand, that alleged right of pro-democratic intervention was rigorously rejected by some writers on the ground that it is a clear violation of well-established norms of international law, such as the principle of non-interference in the internal affairs of other States and prohibition of the use of force in international relations.⁵

This chapter will first consider the right of democratic governance and its legal basis. The second section will examine the theories of international law that have been said to support a doctrine of unilateral pro-democratic intervention. The third will highlight the major cases which have been held by some as models of a new era of pro-democratic intervention, either unilateral actions taken by individual States or multilateral actions taken under the authority of Security Council to restore democracy. Finally, the chapter will examine the invasion of Iraq, to find out whether it can be characterized and justified as a 'pro-democratic' war.

⁵ See Schachter, O. "The Legality of Pro-Democratic Invasion", 78 *AJIL*, 1984; Farer, T. "Panama: Beyond the Charter Paradigm", 84 *AJIL*; Nanda, V. "The Validity of the United States Intervention in Panama under International Law", 84 *AJIL*, 1990

Section A: The right to democratic governance

Many writers have discussed “the emerging right to democratic governance,”⁶ basically arguing that the democratic rights referred to in human rights treaties are not merely urged or recommended. This newly emerging right, that governance should be legitimized by democracy, is not confined to a particular State that has set out such a requirement for national governance, but is acquiring the status of an international, universally applicable legal norm.⁷ From this perspective, a government cannot rule solely by force; effective governance requires the habitual, voluntary compliance of citizens, and cannot depend on the despotic power of a ruler to compel obedience.⁸ Consequently, governments are moving away from totalitarian rhetoric, seeking to legitimize themselves so as to secure people’s support for and compliance with their rule.

For much of the twentieth century, there were a relatively small number of actual democracies in the world; most of the world’s States were, if not inherently undemocratic, at least susceptible to application in deeply undemocratic ways.⁹ In fact, there was no requirement for a State to have a democratically elected government, or one that enjoyed the general support of its people.¹⁰ As mentioned in Chapter 1, civil war or military coup were typical ways of changing governments in many States. General endorsement of a principle of democracy was rendered difficult by the confusion as to exactly what such a right might entail.¹¹ In other words, there was no agreement of the contents or standards for democracy.

⁶ Franck, T. “The Emerging Right to Democratic Governance”, 86 *AJIL*, 1992. See also Crawford, J. “Democracy and International Law”, 44 *BYIL*, 1993. Fox, G. “The Right to Political Participation in International Law”, 17 *Yale JIL*, 1992.

⁷ Franck, *ibid*, p 47

⁸ *Ibid*, p 48

⁹ Crawford argues that until the 1980s only “a third of all the countries of the world could be described as democratic.” Crawford, note 6 *supra*. p 116-7

¹⁰ *Ibid*, p 117

¹¹ *Ibid*, p 113

During the 1980s, however, the tendency for democracy accelerated and democracy came to assume far greater importance.¹² By the end of 1991, according to Franck, more than 110 governments were legally committed to open, multiparty, secret-ballot elections with universal franchise.¹³ Many commentators have viewed this trend as a new discourse in international law and international relations, marked by growing emphasis on democracy as a value and greater willingness by the international community to interest themselves in the matter by mounting pressure for elections, monitoring them, or recognizing the outcomes.¹⁴

Indeed, in the last two decades democratic rights gradually became an international legal obligation upon States rather than merely a moral requirement that governments may choose to abide by or not. This status of democracy clearly appears in many international legal instruments which urge States to mould their foreign and domestic policies in a democratic way, as will be shown below. Furthermore, the enormous political pressure by the world community upon oppressive regimes and undemocratic governments who are reluctant to abandon these regimes and transform their policies into ones that approximate the international human rights standards is a clear indication that democracy today is not only an optional way of governing but an international obligation.

A.1 The right of self-determination

The legal basis for the right of democratic governance in international law—as a prerequisite for the legitimacy for the government—stems from the traditional right of peoples to self-determination. Tomas Franck portrayed self-determination as the historic foundation of the “democratic entitlement,”¹⁵ being its longest and best-established aspect.¹⁶ The principle of self-

¹² Ibid, p 121-2

¹³ Franck, note 6 *supra*. p 47

¹⁴ Chesterman, S. *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford University Press, 2001, p 88-9; see also Crawford, note 6 *supra*. p122-6; Franck, note 6 *supra*. p 47-8.

¹⁵ Franck, *ibid*, p 52

determination entitles people organized in an established territory to decide its government democratically and is therefore essential to democratic rights.¹⁷

In modern history, since 1945, many international treaties emphasize peoples' right of self-determination. Article 1 of the UN Charter established the right of self-determination as one of the purposes of the United Nations, to develop friendly relations between States, not on any terms, but "based on respect for the principles of equal rights and self-determination of peoples."¹⁸ Article 73(b) of the UN Charter imposes a clear obligation upon members responsible for administering non-self-government territories "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions."¹⁹ Furthermore, Article 76(b) requires that inhabitants of the territories placed under the "International Trusteeship System", should be allowed "to promote ...their progressive development towards self-government or independence" in accordance with "the freely expressed wishes of the peoples concerned."²⁰ The principle of self-determination was further enunciated in the annex to the General Assembly Resolution 1541 of December 15, 1960.²¹ The 1970 Declaration on Friendly Relations elaborated the Charter "principle of equal rights and self-determination of peoples"²² by reiterating the duty to end colonialism and to permit each colonial territory to assume a "political status freely determined by"²³ the inhabitants. More broadly, the Declaration attributes to "all peoples"—not

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Article 1 of the UN Charter

¹⁹ Article 73(b) of the UN Charter

²⁰ Article 76(b) of the UN Charter

²¹ Principle VII of the Resolution states that the political destiny of the non-self-governing territory "should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes." General Assembly Resolution 1541 of 15 December, 1960.

²² *Declaration on Friendly Relations* adopted in General Assembly Resolution 2625 (XXV) of 24 October 1970

²³ Ibid

only the inhabitants of colonies—"the right freely to determine, without external interference, their political status."²⁴

Significantly, the concept of a universal right of self-determination was included in the legally binding International Covenant on Civil and Political Rights. Article 1 of the Covenant declared that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."²⁵ Again, it is clear from this binding treaty that the right of self-determination is intended to be applicable to the citizens of all nations, giving them the right to decide their collective political status through democratic means. This treaty is currently ratified or acceded to by 160 States and a further 5 signatories (pending ratification).²⁶ It can safely be argued, therefore, that it is binding on all States as customary law rule.²⁷ Indeed, the signature and ratification of a Convention by a large number of States confirms the widespread acceptance of its provisions among the international community, and provides clear evidence of an *opinio juris* as to the acceptability of these provisions, and that indeed they have been generally accepted. The same principle applies to declaration which passed without a vote or with overwhelming majority.²⁸

The essential measure to ensure people's right of self-determination has been specified clearly in the Universal Declaration of Human Rights. The Declaration expressly elaborates that all people are entitled to choose their governments through a free and democratic voting system was. Article 21(3) of the Declaration states that "The will of the people shall be the basis of the

²⁴ Ibid

²⁵ International Covenant on Civil and Political Rights adopted by General Assembly resolution 220A (XXI) of 16 December, 1966

²⁶ A country-by-country list of declarations and reservations made upon ratification, accession or succession can be seen at <http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm>

²⁷ Meron, T. *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989, p 80-1

²⁸ Sohn, L. "Generally Accepted International Rules", 61 *Washington Law Review*, 1986, p 1077-78

authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”²⁹ Although this Declaration, as a mere General Assembly resolution, was initially a non-binding “standard of achievement,” yet it was passed with overwhelming support³⁰ and its provisions were incorporated into many national constitutions, statutes and judicial decisions.³¹ In this way, the Declaration has become so influential that some of its provisions may be regarded as customary international rules.³²

To conclude, in contemporary international law, as in the UN Charter, the policy adopted has been to maintain the political independence of territorial communities so that they can continue to adopt whatever form of political community they consider appropriate to them.³³ This is the essential principle of political legitimacy. Thus, democratic governance became the one of the strongest and most flourishing concepts in international relations after the Second World War, to the extent that the refusal to permit demonstrably free elections is increasingly becoming recognized as a breach of international law. Successive resolutions, decisions and international declarations and treaties setting out the political rights and freedoms embraced by the Charter provisions, are testimony to their imperative character. The crucial question to be considered now, however, is how such a right of democratic governance is to be enforced and whether this right authorizes one State to intervene and if necessary to use force to enforce this right in another country.

²⁹ *Universal Declaration of Human Rights* adopted by the General Assembly Resolution 217 A (III) of December 10, 1948

³⁰ Franck, note 6 *supra*. p 61

³¹ Schachter, O. “International Law Implications of US Human Rights Policies”, 24 *New York Law School Law Review*, 1978, p 68

³² Franck, note 6 *supra*. p 61

³³ Reisman, “Coercion and Self-Determination: Construing Charter Article 2 (4)”, note 2 *supra*, p 643

Section B: Legal theories of the doctrine of pro-democratic intervention

With this growing concern for democracy, some theories of international law have developed, that are claimed to support a doctrine of unilateral pro-democratic intervention. This section will review and analyse these theories in light of the Purposes and Principles of the UN Charter.

B.1 Interpreting Article 2(4) to enhance the right of self-determination

Some writers have adopted an extreme view of the right to democratic governance. Professor Reisman, for example, strongly asserts the right of a State to use military intervention to overthrow a despotic government in another country. He argues that it would be a “rape of common sense”³⁴ to oppose forcible intervention in such cases, while supporting, through foreign aid, repressive regimes that govern despotically, without the will of the people. In his view, though all interventions are regrettable, “the fact is that some may serve, in terms of aggregate consequences, to increase the probability of free choice of peoples about their government and political structure.”³⁵ Therefore, Article 2(4) must be interpreted in a way legitimizes the unilateral use of force to “enhance opportunities for ongoing self-determination.”³⁶ In other words, Article 2(4) must be applied in a way that people’s opportunity for free choice of government and political structure is increased. If such choice is prevented by

³⁴ Ibid, p 645

³⁵ Ibid. p 644. Reisman argues that “There is neither need nor justification for treating in a mechanically equally fashion Tanzania’s intervention in Uganda to overthrow Amin’s despotism, on the one hand, and Soviet intervention in Hungary in 1956 or Czechoslovakia in 1966 to overthrow popular governments and to impose an undesired regime on a coerced population, on the other.” Ibid.

³⁶ Ibid, p 643. Reisman criticizes the traditional interpretation of Article 2(4) as it conforms to the letter, rather than the spirit and principles of the Charter and therefore, is not in line with the contemporary political reality. He argues that the traditional interpretation of Article 2(4), to prohibit all forms of the use of force in international relations, was based on the political context and technological environment that prevailed at the end of the 19th century, when the only threat to the right of political independence of a people within a particular territorial community came from external, overt invasion. That context, however, has been gradually changing. The current reality is that in some communities, if there are no established, firmly embedded procedures for the transfer of power, the way is open for a group of military officers to seize power, irrespective of a lack of popular support; an internal threat to the right of political independence. Therefore, Article 2(4) must be reconsidered in the context of the modern political environment in order to safeguard the basic principle of political legitimacy and support the right of people to determine their own political destinies, in the face of internal as well as external threat. Ibid. p 643-5

a repressive government, a foreign State should have the right to use force to bring about a desirable end of “ongoing self-determination.”

Certainly, this extreme view of the right of self-determination and the expansive interpretation of Article 2(4) to allow foreign power to intervene and overthrow despotic regimes are implausible and problematic. Such a broad interpretation of Article 2(4) is a clear violation of the plain language of the Charter and the interpretations that States have given Article 2(4) since the creation of the UN Charter.³⁷ In addition, although the principle of self-determination is an important principle of international law, it does not automatically take precedence over other well-established and important norms of international law,³⁸ such as non-interference in internal affairs and the prohibition of use of force in international relations. In other words, there are no legal grounds to suggest that democracy has priority over other important international legal principles.

In contrast, the opposite conclusion is the preferable one because. Peace that was the primary concern of the founders of the UN Charter and has priority over any other principle of the UN Charter. As Henkin has rightly observed, in modern international law and the law of the United Nations Charter, peace is the paramount value, taking precedence over progress and even justice. This is because war, except in self-defence, inflicts such damage and injustice that the purposes of the UN could not be achieved where war prevails.³⁹ This view finds support in the ICJ’s judgment in the *Corfu Channel* case. In that case, the Court rejected the defence of the United Kingdom that it had used armed force in the cause of international justice. The Court stated that it “cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most

³⁷ Chesterman, note 14 *supra*, p106

³⁸ Schachter, “The Legality of Pro-Democratic Invasion”, note 5 *supra*, p 647-8

³⁹ Henkin, L. “The Use of Force; Law and U.S. Policy” in Louis Henkin (ed), note 2 *supra*, p 38-9

serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.”⁴⁰

Another argument in favour of intervention to bring down tyrannical regimes has been put forward by D’Amato. He argues that such intervention does not violate Article 2(4) of the UN Charter; as the prohibition of the use of military force expressed in that article applies only to “territorial aggrandizement or colonialism.”⁴¹ Thus, action to overthrow tyranny and to protect the freedom of the people, with no territorial claim on any part of that country, does not constitute a violation of the territorial integrity or political independence of the State concerned, since the forces of intervention will withdraw, leaving the State concerned as an independent nation.⁴²

This argument, however, is clearly inconsistent with the manifest intent of those States who, during San Francisco Conference, proposed and supported the inclusion of the phrase “against the territorial integrity and political independence of any member State” The true intention behind this clause was to strengthen Article 2(4) against any intervention by a foreign State, whatever minor or temporary this intervention is; exactly opposite to what D’Amato is suggesting.⁴³ The plausible and preferable view, in accordance to the Purposes and Principles of the UN Charter, is that any incursion, however short-lived, violates the essence of territorial integrity. This view was held by the ICJ in *Corfu Channel* case. In that case, Britain argued that

⁴⁰ *Corfu Channel* case, ICJ Reports, 1949, p 35

⁴¹ D’Amato, note 2 *supra*, p 520

⁴² Ibid. Similar argument was expressed by Jean Kirkpatrick and Allan Gerson, arguing that “the protection of territorial integrity provided in Article 2(4) is not the same thing as territorial inviolability. Territorial integrity is preserved so long as none of a State’s territory is taken from it.” Kirkpatrick & Gerson, note 2 *supra*, p 32

⁴³ See Chapter 1, section B.1

it had not violated Albania's territorial integrity when the Royal Navy temporarily encroached on Albanian territorial waters to remove a minefield.⁴⁴ The Court, however, unanimously rejected this argument stating that "Between independent States, respect for territorial integrity is an essential foundation of international relations...to ensure respect for international law...the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty."⁴⁵

Moreover, indubitably intervention by one State to remove the government of another State is a violation of the political independence of the later, whatever its internal policies.⁴⁶ Furthermore, one of the overriding Principles of the Charter is to prohibit interference in matters essentially within the domestic jurisdiction of the member States. Indeed, Article 2(7) expressed such a prohibition with respect to the organs of the UN itself; this prohibition, a fortiori, applies for individual States.

The US administration, during the US invasion of Grenada in 1983, adopted a view similar, but not identical, to D'Amato's view. Ambassador Kirkpatrick, the US representative to the UN, argued in the Security Council that the language used in Article 2(4), "or in any other manner inconsistent with the purposes of the United Nations," provides "ample justification" for the use of force "in pursuit of the other values also inscribed in the Charter—freedom, democracy, peace."⁴⁷ This argument is misleading because the foremost purpose of the Charter, as expressed in Article 2(4), was to absolutely prohibit unilateral use of force by States, except in the case of self-defence. Intervening in another country's internal affairs is forbidden and "inconsistent with the purposes of the United Nations," as stated by Article 2(7). In addition, the right of self-

⁴⁴ Statement by Sir Eric Beckett (UK) on November 11, 1948 in Pleadings (3 Corfu Channel), *Corfu Channel* case, ICJ Reports, 1950, p 264

⁴⁵ *Corfu Channel* case, ICJ Reports, 1949, p 4, 35

⁴⁶ Schachter, "The Legality of Pro-Democratic Invasion", note 5 *supra*, p 649

⁴⁷ Dep't St. Bull., No. 2081, December 1983, p 74

determination, which is the alleged reason for intervention, was designed for the people of the country, not for foreign powers.

Overall, in reality, the arguments advanced in favour of forcible intervention to topple despotic regimes and to promote democracy would offer a new justification for the resort to force that would allow powerful States, virtually unconstrained, to overthrow governments allegedly not representative of the popular will, or opposed to the goal of self-determination. Such a right has worrying implications. While invasions may sometimes support democratic values, there is also a danger of legitimizing armed attacks against peaceful governments.⁴⁸ Furthermore, it is highly questionable whether military intervention can be an effective means of safeguarding democratic values, since it prevents the genuine development of democracy. If democratic norms are well established in the target State, they will probably prevail without outside intervention. If they are underdeveloped or nonexistent, they are likely to be imposed through the tutelage of the intervening State, contrary to the concept of self-determination.⁴⁹ In other cases, as the case of Iraq demonstrates, the target State will descend into prolonged chaos and the action, eventually, will cause more harm to those whom the acting State desires to protect. In fact, none of the changes proved dazzlingly successful, in the sense of establishing a reasonable and decent internal system of public order, as will be shown below.

Moreover, on a careful reading of the human rights instruments, especially the Universal Declaration of Human Rights, one can safely argue that, while these instruments emphasize citizens' right of democratic governance and establish international standards to this effect, they are couched in very general terms and open to a wide margin of appreciation. Hence, the way a particular regime is perceived may vary from one foreign State to another. Whose standards are to be used to make that judgment? Who is entitled to decide whether a given government has met

⁴⁸ Schachter, "The Legality of Pro-Democratic Invasion", note 5 *supra*. p 649

⁴⁹ Nanda, note 5 *supra*, p 499

these standards? These problems make Reisman's and D'Amato's criteria difficult to apply uniformly and create the danger of permitting justification of intervention in almost any case. The important point, however, is that the right of self-determination which is the cornerstone of the "democratic entitlement" is vested in 'the people', and that it is they who must decide their own political structure—not a foreign power who is no more elected,⁵⁰ by the target people, than those they accuse and seek to overthrow. For a foreign power to seek to impose its blueprint nation building is an arrogant usurpation of the right of self-determination.

For these reasons, arguments in support of military intervention for the sake of the institution of democracy could not be accepted. The right of self-determination was designed for and is only exercisable by the people of the country and, in no plausible way, can be interpreted to imply that a foreign State may intervene unilaterally in another country to remove an oppressive government and institute a desirable status of "ongoing self-determination".

B.2 Changing in the concept of sovereignty

A similar theory based on people's right of self-determination and the freedom to choose their political destinies, which has also been said to support the doctrine of unilateral pro-democratic intervention, is the concept of "popular sovereignty". Reisman argued that since the end of World War II, the traditional concept of sovereignty was being replaced by the sovereignty of the people (popular sovereignty).⁵¹ He argued that this conception of sovereignty had become established as the "critical new constitutive policy"⁵² of international law and was one of the essential prerequisites of political legitimacy. Accordingly, it is, in fact, the sovereignty of

⁵⁰ Chesterman, note 14 *supra*, p 110

⁵¹ Reisman, W. "Sovereignty and Human Rights in Contemporary International Law", 84 *AJIL*, 1990, p 867

⁵² *Ibid.* p 874

peoples rather than that of the sovereign, which is safeguarded by contemporary international law.⁵³

The basic idea of popular sovereignty is that political legitimacy stems from popular support; a government rules with the consent of the people in the territory over which claims power. Consequently, the term 'sovereignty' constituted an anachronism when applied to undemocratic governments or leaders.⁵⁴ Following his argument to its conclusion, Reisman suggested that unilateral intervention to maintain or restore democracy, far from violating sovereignty and, hence, international law, actually supports and sustains it.⁵⁵ From another perspective, it has been argued that the contemporary international human rights programme is based on the notion that human beings take priority over States, and that the internal political structure and government of every State must now conform to certain prescribed international norms or be liable to intervention, regardless of sovereignty.⁵⁶

A similar view was put forward by D'Amato, who rejects assertions of the principle of non-intervention as nothing more than examples of "the rhetoric of statism."⁵⁷ He argued that the idea of non-intervention is so influenced by the statist view of international law that its proponents appear to be incapable of seeing beyond the notion of 'the State' to the reality of human beings

⁵³ Ibid. p 869

⁵⁴ Reisman argues that "the unilateral declaration of independence by Smith Government in Rhodesia was not an exercise of national sovereignty but a violation of the sovereignty of the people of Zimbabwe. The Chinese Government's massacre in Tiananmen Square to maintain an oligarchy against the wishes of the people was a violation of Chinese sovereignty. The Ceausescu dictatorship was a violation of Romanian sovereignty. President Marcos violated Philippine sovereignty, General Noriega violated Panamanian sovereignty, and the Soviet blockade of Lithuania violated its sovereignty. Fidel Castro violates Cuban sovereignty by mock elections that insult the people whose fundamental human rights are being denied...." Ibid, p 872

⁵⁵ Ibid, p 876

⁵⁶ Reisman, W. "Why Regime Change is (Almost Always) a Bad Idea", note 3 *supra*, p 517

⁵⁷ D'Amato, note 2 *supra*. p 518

striving for basic freedom.⁵⁸ D'Amato concluded that unilateral intervention against tyranny "is not only legally justified but morally required."⁵⁹

This justification of the use of force to promote democracy is based on a radically new understanding of sovereignty,⁶⁰ which challenges the traditional, well-settled and accepted presumption, expressed by Moore in the early twentieth century, that "the origin and organization of government are questions generally of internal discussion and decision."⁶¹ As a corollary, foreign States are banned from interfering in the domestic affairs of another State. They "deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the State in its ability to maintain itself, and discharge its internal duties and its external obligations."⁶² Thus, one can conclude that the usurpation of power in one country or the illegitimacy of a government does not affect its sovereignty as a sovereign on the international arena as long as that government has effective control and can fulfil its responsibilities.

This understanding of the notion of sovereignty was asserted by Chief Justice Taft in the *Tinoco* case and later by the ICJ in the *Nicaragua* case. In the *Tinoco* case (Great Britain v. Costa Rica), Costa Rica argued that the Tinoco government was not a *de facto* or *de jure* government [of Costa Rica] according to the rules of international law, on the ground that Tinoco (the Secretary of War under President Alfredo Gonzalez of Costa Rica, in 1917) had used the army and navy to seize the government and overthrow President Gonzalez in violation of the Constitution and against the popular sovereignty of the Costa Rican people. Therefore, the subsequent Costa Rican Government denied its liability for the acts or obligations of the Tinoco government on the

⁵⁸ Ibid. p 516

⁵⁹ Ibid, p 519

⁶⁰ Chesterman, note 14 *supra*, p 91

⁶¹ Moore, J. *Digest of International Law*, Vol. 1, Washington, 1906, p 249

⁶² Ibid

basis that his actions could not be deemed to have bound Costa Rica.⁶³ On the other hand, Great Britain contended that “the Tinoco government was the only government of Costa Rica *de facto* and *de jure* for two years and nine months; that during that time there is no other government disputing its sovereignty.”⁶⁴ Chief Justice Taft decided that by virtue of his effective control, Tinoco had represented the legitimate government as long as he enjoyed that control and “[n]o other government of any kind asserted power in the country.”⁶⁵

Reisman, while acknowledging that the Tinoco decision “was consistent with the law of its time”⁶⁶ suggested that it was no longer applicable, being contrary to what he called “the new constitutive, human rights-based conception of popular sovereignty.”⁶⁷ This argument, however, can be challenged, since the same principle was upheld by the ICJ in the *Nicaragua* case some seventy years later, after the establishment of the concept of “popular sovereignty”. The Court held that, regardless of what the United States thought of Nicaragua’s Sandinista regime, “Adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua’s domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of.”⁶⁸ In further affirmation of Nicaragua’s sovereignty despite its internal political structure or policies, the Court stated that “The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or world, should be

⁶³ Arbitration Award of *Tinoco* case between Great Britain and Cost Rica, reprinted in 18 *AJIL*, 1924, p 148-9

⁶⁴ Ibid. p 149

⁶⁵ Ibid. p 151

⁶⁶ Reisman, “Sovereignty and Human Rights in Contemporary International Law”, note 51 *supra*, p 870

⁶⁷ Ibid

⁶⁸ *Nicaragua Judgement* (Merits), ICJ Reports, 1986, p133, para 263

fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.”⁶⁹ Thus, the Court affirmed the principle of sovereignty as established in its traditional meaning. The illegitimacy of a government is essentially an internal affair which does not affect its sovereignty.

It could be admitted, however, that contemporary international law, as enunciated in many international treaties and legal instruments, emphasizes that the political legitimacy of a government is based on the consent of the people in the territory.⁷⁰ This principle has become one of the fundamental principles of modern international law. It can also be agreed that the concept of sovereignty has, to some extent, been changed in the sense that the internal organization and modes of governance of each State must meet the international human rights standards. States are no longer free to employ policies that violate the universal human rights standards. As expressed by the United Nations Secretary-General Kofi Annan, in his important Statement, “State sovereignty, in its most basic sense, is being redefined. . . States are now widely understood to be instruments at the service of their peoples, and not vice versa.”⁷¹ Nonetheless, it does not follow that a regime that violates these standards has to be subject to forcible change by unilateral foreign power. Furthermore, the illegitimacy of a government would not mean that this nation has lost its sovereignty in the international arena and become a

⁶⁹ Ibid, (1984), p187

⁷⁰ See, for example, note 29 *supra*

⁷¹ Kofi A. Two Concepts of Sovereignty, *Economist*, September 18, 1999, at 49, available at <<http://www.un.org/News/ossg/stories/kaecon.htm>>

legitimate target of foreign intervention. Neither any international treaty nor the UN Secretary-General has suggested such a claim. To hold otherwise would mean, as a political reality, that a substantial number of the world States, whose political system is perceived to be undemocratic, especially in the third world, have lost their sovereignty and, therefore, are legitimate targets for intervention by foreign powers. Moreover, the crucial question with this formula is who is competent to decide whether the existing government has the popular support and, as a consequent, still holds its sovereignty?

It is insufficient to allege a violation of the rights of people in a given State and to prioritize this over a conflicting international norm that prohibits the unilateral use of force in international relations. Despite the importance given to democracy in many international legal instruments, this is not to set it above peace as the chief concern of the international legal system. It can be concluded, therefore, that irrespective of the part played by the concept of popular sovereignty in modern international law, this does not entitle a foreign State, on the ground of the alleged illegitimacy of one regime, to take military action to install a more legitimate alternative. Furthermore, in reality, there is nothing called benign use of force on behalf of the people of another country. War is awful, and force cannot be benign.

B.3 The Reagan Doctrine

The Reagan doctrine is the nearest approach to a foreign policy consistent with a right of pro-democratic intervention, expressed by a State administration.⁷² According to that doctrine, it is not necessarily wrong to help in overthrowing an existing government. Such actions have to be judged in terms of the political and moral context: the kind of government, the role played by the interveners, and whether there is resistance.⁷³ The Reagan Doctrine has been described as relying on the traditional American doctrine that the legitimacy of a regime depends on its respect for

⁷² Chesterman, note 14 *supra*, p 93

⁷³ Kirkpatrick & Gerson, note 2 *supra*. p 22

individual rights and the consent of the governed. If it violates these rights, citizens are entitled to engage in armed revolt and foreign support, including the use of force, can be justified as a last resort.⁷⁴

In defending the Reagan Doctrine, Jean Kirkpatrick and Allan Gerson argued that “A government is not legitimate merely because it exists, nor merely because it has independent rules. Nazi Germany had a *de facto* government headed by Germans; that did not make it legitimate. Nicaragua today [in 1989] has a *de facto* government headed by Nicaraguans who were not elected in any competitive sense, who came to power by armed force....”⁷⁵ The Reagan Doctrine is, thus, like Reisman’s argument in that it does not accept that any government must be necessarily respected; in other words, it challenges the inviolability of sovereignty. As to the present case, it seems that the Bush Administration adopted the same view in regard to Iraq; that is, although Saddam’s regime was the *de facto* government of Iraq, however, it was illegitimate because it lacked popular support. Subsequently, its sovereignty was not inviolable.

The Reagan Doctrine, in fact, linked the people’s right of self-determination to the US right of self-defence against threats from the Soviet Union. It evolved initially, mainly as a response to Brezhnev’s policies, and was intended to oppose what the US saw as Soviet empire-building.⁷⁶ As such, the legal basis for the “support—including military support—for insurgencies”⁷⁷ was justified on the grounds of self-defence. This was made clear by President Reagan when he declared that “We must not break faith with those who are risking their lives—on every

⁷⁴ Ibid. p 20-1

⁷⁵ Ibid. p 23

⁷⁶ Ibid

⁷⁷ Ibid, p 20

continent, from Afghanistan to Nicaragua—to defy Soviet-supported aggression and secure rights which have been ours from birth....Support for freedom fighters is self-defence.”⁷⁸

Supporters of the Reagan Doctrine argued that it is a misconstrual of international law and the law of the UN Charter to say that Reagan Doctrine violates the Charter’s requirement of non-use of force and non-interference in the internal affairs of others. International law, they argue, does not totally forbid assistance to indigenous groups striving for democratic self-determination.⁷⁹ They suggest that the prohibition of the use or threat of force Stated in Article 2(4) should not be viewed in isolation, but interpreted in the light of the Charter as a whole, as complementary to Article 51 and the various articles on human rights. The Charter espouses a commitment to human rights, which necessarily include democratic freedom. It was not intended, and should not be interpreted, to protect the expansion of repressive dictatorships or empires.⁸⁰

In short, the Reagan administration saw nothing in the words of the UN Charter or the principle of sovereignty that would prevent the rendering of support, even including use of force, to groups trying to secure their right of democratic self-determination against oppressive regimes. Rather, they saw it as in keeping with the philosophy underlying the UN Charter, that encourages the promotion of human rights, liberties, and self-determination of peoples. This argument, however, is implausible and the Reagan Doctrine was rejected by most of the world community. It was strongly criticized and US action in Grenada under the Doctrine was condemned by the General Assembly;⁸¹ the Security Council had considered a resolution deploring the intervention as a violation of international law but this was vetoed by the US.⁸²

⁷⁸ President Ronald Reagan, “Address Before a Joint Session of the Congress on the State of the Union, February 6, 1985”, *Public Papers of the Presidents of the United States: Ronald Reagan, 1985*, Book I, Washington D.C: US Government Printing Office, 1988, p 135

⁷⁹ Kirkpatrick & Gerson, note 2 *supra*, p 32

⁸⁰ *Ibid.* p 25-6

⁸¹ General Assembly Resolution 38/7 of 2 November, 1983

⁸² *UNYB*, 1983, p 211

It is admitted that the UN Charter requires all member States to promote democracy and respect for human rights, including the right of self-determination. But the Charter and the international system have been and are still adamant that those essential goals are not to be pursued by force. As to the use of force, the Charter is neutral between democracy and totalitarianism.⁸³ As expressed by Henkin: “international law provides no more bases for permitting the export of democracy by force than for permitting the export of socialism by force.”⁸⁴ He further added that, from a legal perspective, it is inconsistent to justify the US action in Grenada or support for the Contras and condemn the Soviet Union’s interference in Czechoslovakia; all are violations of the intention of the Charter.⁸⁵ Indeed, as illustrated in Chapter 1,⁸⁶ the clear intention of the drafters of the UN Charter was that the prohibition on the use of force under Article 2(4) is to be applied generally, irrespective of the kind of regime being supported or the purpose of intervention. The use of force in support of a freely elected government, or of people trying to establish a freely elected government, is no more acceptable than that in support of a dictatorship or a totalitarian regime.

Apart from its illegality, one can observe a clear distinction between the Reagan Doctrine and the other theories for unilateral right of pro-democratic intervention. It is suggested that although the Reagan Doctrine shares some aspects of the above-mentioned theories justifying unilateral intervention to promote democracy, it is much narrower in scope. While these theories are concerned with the universal promotion of democracy wherever peoples’ right of self-determination is violated, the Reagan Doctrine seeks to defend with the moral legitimacy of US action—including the use of force, in support of insurgencies under certain circumstances: where there is resistance that is being maintained by force; and where the regime in question is a client

⁸³ Henkin, note 39 *supra*, p 62-3

⁸⁴ *Ibid.* p 56

⁸⁵ *Ibid*

⁸⁶ See chapter 1, section B. 2

of the Soviet Union or the Soviet bloc. In other words, the Reagan Doctrine was not intended to legitimize intervention to assist all freedom fighters worldwide, but only specifically to oppose regimes that were influenced by socialist ideology and governed with the support of the Soviet Union. Therefore, it could be safely concluded that Reagan Doctrine and its application in Grenada,⁸⁷ in fact, cannot be held as a model for the right of unilateral pro-democratic intervention. It was a part of the Cold War and ended with the end of that war. Hence, it is not appropriate to be invoked as a general theory supporting the right of pro-democratic intervention.

B.4 The Copenhagen Document

Malvina Halberstam claims to find support for the democratic intervention theory in the Copenhagen Document of 1990, adopted by the Conference on Security and Co-operation in Europe (CSCE), as one of several instruments elaborating the non-binding Final Act of Helsinki. The Copenhagen Document contains general principles related to respect of human and minority rights, especially Article 6 which links human rights with representative government, and maintaining the responsibility of States to defend and protect these institutions. Under that article “[t]he participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government.”⁸⁸ And, as quoted by Halberstam, the signatories “recognize their responsibility to defend and protect....the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating State.”⁸⁹

In Halberstam’s view, this is strong evidence that the Copenhagen Document authorizes intervention, even militarily, by one State to protect a freely elected government in another State,

⁸⁷ See section C.1.1 *infra*

⁸⁸ Article 6 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE), June 29, 1990, reprinted in 29 *ILM*. 1305, 1990

⁸⁹ Halberstam, note 2 *supra*, p 165

if it is prevented from taking office or overthrown by violent means. She asserts that it is not only the right but also the responsibility of other States to restore the freely elected government to power, by the use of force if necessary.⁹⁰ On the latter point, she argued that “[w]hile paragraph 6 does not specifically authorize the use of force, neither does it prohibit the use of force.”⁹¹

One cannot, however, accept this argument, first and foremost because Halberstam misquoted Article 6 in order to support her view; her ellipsis omitted an important clause which undermined her argument.⁹² The full words of Article 6 are that the participating States “recognize their responsibility to defend and protect, in accordance with their laws, their international human rights obligations and their international commitments, the democratic order freely established.” Thus, Article 6 while urging participating States to uphold their responsibilities of defending and protecting democracy in other countries, emphasises that this responsibility should be carried out in a lawful way that does not violate other principles of international law. The language and construction of words in the article clearly indicate that the responsibility to “defend and protect the democratic order” is not and cannot be a pretext to violate other international obligations such as the prohibition of use of force in international relations and the principle of non-interference. As properly pointed out by Simon Chesterman, “by implication, [the omitted words in Halberstam’s extract] would make such defence and protection subject to Articles 2(4) of the UN Charter.”⁹³

There are, indeed, some circumstances when assistance is called for by a freely elected government in danger of deposition, when intervention would not constitute a violation of article 2(4). Presumably this is the situation envisaged by the Copenhagen Document. Halberstam,

⁹⁰ Ibid. p 167

⁹¹ Ibid

⁹² A similar observation has been made by Simon Chesterman, note 14 *supra*. p 94-5

⁹³ Ibid. p 95

however, extends this to situations where no such request has been made.⁹⁴ Her justification for this is that it is possible that the freely elected government may be unable to communicate with foreign governments or prevented from so doing by fear of jeopardizing the lives of the elected officials or of others.⁹⁵ Therefore, she argued that, irrespective whether assistance has actually been called for, foreign States are entitled to intervene in support of the freely elected government.

Halberstam goes so far as to claim that the Copenhagen Document, though not a treaty, reflects a new or emerging right of intervention supported by customary law, independent of Article 2(4). She takes the Document to represent the views of most of the major world powers, and cites Franck's analysis of the United Nations Charter, to claim that the provisions of the Copenhagen Document are "weighted with the terminology of opinion juris and deliberately norm creating."⁹⁶ However, Simon Chesterman rightly noted that the extent to which GSCE documents can be taken as evidence of customary international law is controversial. Though not enforceable in themselves, it can be suggested that they provide evidence of customary international law or, at least, will influence its development, but that Halberstam's claim in this respect is exaggerated.⁹⁷ To conclude, Halberstam's reading of the Copenhagen Document does not bear scrutiny. On the contrary, the proper interpretation, based on the full words of Article 6, gives defence and protection to the well-established norms and principles of international law, especially to prohibition of use of force in international relations enunciated in Article 2(4) of the UN Charter. Furthermore, with the sole exception of the United States, there is no State practice to support

⁹⁴ Ibid

⁹⁵ Halberstam, note 2 *supra*, p 167

⁹⁶ Ibid. p 175

⁹⁷ Chesterman, note 14 *supra*, p 95

her interpretation. Finally, the status of the Copenhagen Document *per se* would undermine any claim to representing *opinio juris* or creating a new rule of customary international law.⁹⁸

Section C: Pro-democratic intervention in practice

Following the discussion of the arguments and theories put forward by those who advocate a unilateral right of pro-democratic intervention, the present section analyses two major examples of unilateral intervention which have sometimes been justified on this pro-democratic basis: the US interventions in Grenada (1983) and Panama (1989). It also examines two cases where the Security Council has authorized actions to restore democracy and which also have been held a major contribution to the notion democratic governance and, hence, as a support for the doctrine of unilateral pro-democratic intervention: the intervention in Haiti (1994) and Sierra Leone (1997)

C.1 Unilateral intervention in State practice

C.1.1 The invasion of Granada 1983

On 25 October 1983, following a violent *coup d'état* in Grenada by radical Marxist opponents of the leftist Maurice Bishop regime, US forces invaded the island, in “*Operation Urgent Fury*.” Within three days, the self-appointed Revolutionary Military Council had been overthrown. By 15 December, the US had withdrawn, leaving behind a small number of US and Caribbean support personnel.⁹⁹ The US government sought to justify its intervention in Grenada on three grounds. Firstly, they claimed, they had been requested to assist by the Governor-General of Grenada, Sir Paul Scoon, whose legal authorities “remained the sole source of governmental

⁹⁸ Ibid. p 96

⁹⁹ *Keesing's Contemporary Archives*, 1984, 32614-18; see also Levitin, M. “The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention”, 27 *Harvard ILJ*, No 2, 1986, p 642-5

legitimacy on the island in the wake of the tragic events.”¹⁰⁰ Secondly, they tried to characterize the action as one of lawful collective security under Articles 3, 4, and 8 of the Treaty of the Organization of Eastern Caribbean States, whereby member States are authorized to take action to maintain peace and security in the region and to “deal with local as well as external threats to peace and security.”¹⁰¹ Thirdly, the Reagan Administration invoked the right of States to take military action to protect their nationals abroad.¹⁰² These justifications were not accepted by the world community and, as mentioned above,¹⁰³ a Security Council resolution deploring the intervention as a violation of international law was proposed by members of the Council but was vetoed by the United States.¹⁰⁴ The General Assembly did, however, pass a resolution that “[d]eeply deplore[d] the [US] armed intervention in Grenada” as “a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State.”¹⁰⁵ Interestingly, although some writers have cited the intervention in Grenada as an example of the right of pro-democratic intervention, the United States itself did not seek to raise this justification, or any justification that could be seen to imply a right of pro-democratic intervention. Indeed, such a justification was expressly denied by a State Department Legal Adviser in correspondence with the American Bar Association. He clearly announced that the Reagan administration had not adopted an expanded view of self-defence, “new interpretations of the language of Article 2(4),” or “assert a broad doctrine of “humanitarian intervention.”¹⁰⁶

¹⁰⁰ American Deputy Secretary of State Kenneth Dam, “Statement before the House Committee on Foreign Affairs, 2 November 1983”, in Leich, M. “Contemporary Practice of the United States Relating to International Law”, 78 *AJIL*, 1984, p 203

¹⁰¹ *Ibid*

¹⁰² Rebinson, D. “Letter Dated 10 February 1984, addressed to Professor Edward Gordon, Chairman of the Committee on Grenada of the American Bar Association’s Section on International Law and Practice”, in Leich, M “ “Contemporary Practice of the United States Relating to International Law”, 78 *AJIL*, No 3, 1984, p 661; see also Levitin, note 99 *supra*, p 645

¹⁰³ See notes 81 & 82 *supra*

¹⁰⁴ *UNYB*, 1983, p 211

¹⁰⁵ General Assembly Resolution 38/7 of 2 November, 1983

¹⁰⁶ Rebinson, note 102 *supra*, p 665

However, even if it had done so, the negative reaction to the Grenada invasion clearly indicates that the *opinio juris* at the time did not support such a doctrine.¹⁰⁷

Therefore, Grenada does not provide strong evidence to support a unilateral right of pro-democratic intervention, even at regional level. On the contrary, the Grenada case, in fact, signifies the weakness of the theory of pro-democratic intervention as a legal ground for the use of force. The American administration's deliberate evasion to invoke such a theory for its action, and actually its rejection for such claim, *per se* designates the flaw of this doctrine as States usually attempt to justify their military actions on solid legal grounds with a high probability of being accepted in the international community.

C.1.2 The invasion of Panama 1989

Paramount among the instances cited by supporters of a unilateral right of pro-democratic intervention, as evidence of their theory, is the US invasion of Panama. The Panama crisis unfolded in 1989 when its President, General Manuel Noriega, agreed to hold an election in which, in the view of all international observers, he was heavily defeated by U.S.-favoured opposition candidate, Guillermo Endara. Noriega, however, refused to accept the election outcome and continued to rule Panama through the Panamanian Defence Force (PDF), which suppressed Endara and other political opponents.¹⁰⁸ The Noriega regime was openly hostile to the US personnel and nationals present in Panama, but the deterioration in relations culminating in an announcement by the Noriega's National Assembly that "the Republic of Panama is in a State of war for the duration of the aggression unleashed against the Panamanian people by the US government."¹⁰⁹

¹⁰⁷ Chesterman, note 14 *supra*, p 102

¹⁰⁸ Sofaer, A. "The Legality of the United States Action in Panama", 29 *Columbia Journal of Transnational Law*, 1991, p 288-9

¹⁰⁹ Foreign Broadcast Information Service, FBIS-LAT-89-241, December 18, 1989, at 20

On 20 December 1989, President Bush (senior) initiated *Operation Just Cause* to depose Noriega and arrest him for alleged drug-trafficking into the US. In his Address to the Nation on December 20, 1989, President Bush put forward four grounds for *Operation Just Cause*: “to safeguard the lives of Americans, to defend democracy in Panama, to combat drug trafficking and to protect the integrity of the Panama Canal Treaty.”¹¹⁰ After Noriega turned himself in to the US military authorities in Panama on January 3, 1990, President Bush declared that the US has accomplished all its objectives and that the use of force against Panama was “consistent with political, diplomatic and moral principles.”¹¹¹

Analysis of the legal basis for the action shows that what most closely resembled a legal argument for the invasion was the exercise of an inherent right of self defence protected under Article 51 of the UN Charter and, arguably, extending to the protection of nationals abroad. This ground was the chief justification for the invasion and the one most emphasised by the US. President Bush stated that General Manuel Noriega had declared “a State of war with the United States and publicly threatened the lives of Americans in Panama.”¹¹² Following this declaration, he claimed, an unarmed American serviceman had been murdered by Noriega’s forces and others had been beaten and harassed.¹¹³ General Noriega’s “reckless threats and attacks upon Americans in Panama,”¹¹⁴ he argued, had created an “imminent danger to the 35,000 American citizens in Panama,”¹¹⁵ placing an obligation on him, as President, “to safeguard the lives of American citizens.”¹¹⁶

¹¹⁰ Statement by President Bush (senior), “Address to the Nation Announcing United States Action in Panama”, December 20, 1989, Office of the Press Secretary, the White House [Hereinafter Bush Address]

¹¹¹ Statement by President Bush of January 3, 1990, Office of the Press Secretary, the White House

¹¹² Bush Address, note 110 *supra*

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Ibid

Although President Bush invoked protection of American citizens as his main legal justification for the Panama operation, legal commentators, who advocate the right of pro-democratic intervention, were more favourably inclined towards the claim that intervention may be justified in support of democracy. They regarded the American intervention in Panama as a significant and positive development of international law. D'Amato, for example, argued that "the US interventions in Panama and, previously, Grenada are milestones along the path to a new non-statist conception of international law that changes previous non-intervention formulas."¹¹⁷ He suggested that these interventions were "a major customary law development"¹¹⁸ and a "new customary rule"¹¹⁹ which permit unilateral use of force to overthrow tyrannical regimes.¹²⁰ Reisman similarly, quoting the remark of Thomas Pickering (the US Permanent Representative to the UN at the time of Panama invasion), heralded a new era in which "the people, not governments, are sovereign."¹²¹ He argued that to say that "Panama's sovereignty is violated by the removal of the usurper and the establishment of conditions for the assumption of power by the legitimate government, this is an anachronism."¹²² Taking it to the extreme, Sir Elihu Lauterpacht argued that the only justification offered by the United States with any merit was that it had "acted in support of the democratic process—a concept of internationally recognized relevance."¹²³ Nevertheless, the action was widely condemned by the international community. As in the case of Grenada, a Security Council resolution was blocked by the US veto¹²⁴ and,

¹¹⁷ D'Amato, note 2 *supra*, p 517

¹¹⁸ Ibid. p 523

¹¹⁹ Ibid

¹²⁰ Ibid. p 524

¹²¹ Reisman, W. "Sovereignty and Human Rights in Contemporary International Law", note 51 *supra*, p 874; see also Thomas Pickering remarks of 23 December, 1989, *UN Doc. S/P 2902*, p 8

¹²² Reisman, *ibid*

¹²³ Lauterpacht, E. "Letter to the Editor: Legal Aspects of Panama Invasion", *The Times*, 23 December, 1989

¹²⁴ *UNYB*, 1989, p 175

again as with Grenada, the General Assembly condemned the action as “a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States.”¹²⁵

Abraham Sofaer, Legal Adviser to the US Department of State at the time of the invasion, argues that “President Bush’s authorization of the US action in Panama was founded upon Noriega’s illegitimacy, as well as upon President Endara’s approval and cooperation.”¹²⁶ There were, thus, two foundations to the US claim of pro-democratic intervention: the exercise of a right to act unilaterally to promote democracy in another State, and as legitimate support for a democratically elected head of State, Guillermo Endara, who, the Bush Administration claimed, had consented to the operation.

The first of these justifications appears to be in line with Reisman’s suggestion that the concept of sovereignty has been replaced by “popular sovereignty” and also consistent with the Reagan Doctrine that assistance to indigenous groups striving for democratic self-determination is not forbidden in international law. If Reisman’s suggestion and the Reagan Doctrine are accepted, “*Operation Just Cause*” might be held legitimate, since it overturned Noriega’s denial of the Panamanian people’s right of self-determination and reinstated their democratically elected president. Accordingly, such intervention would not violate the sovereignty of Panama and therefore international law; instead it upheld and vindicated the “popular sovereignty” of the Panamanian people. However, as argued previously, self-determination is not automatically prioritised over other deep-rooted and important international legal principles, and irrespective of the part played by the concept of popular sovereignty in modern international law, this is not to say that the illegitimacy of one regime entitles a foreign State to intervene militarily to install a new and more legitimate regime. The rejection of the action by most of the world community, despite their awareness of the situation in Panama, supports this view.

¹²⁵ General Assembly Resolution 44/240 of 29 December, 1989

¹²⁶ Sofaer, note 108 *supra*, p 288

The second line of the argument is that the intervention was legitimate assistance to a democratically elected head of State, President Guillermo Endara. Sofaer argued that Endara was informed of the impending arrival of US troops on 19 December 1989, and he decided to be sworn in as president. He welcomed the American intervention and called on the Panamanian forces not to resist it, saying that the US operation was unavoidable and was intended to end the Noriega dictatorship and re-establish democracy, justice and freedom.¹²⁷ The Permanent Representative of the US to the UN, in a letter to the President of the Security Council dated December 20, 1989, argued that Endara was consulted prior to the action: "the United States undertook this action after consultation with the democratically-elected leaders of Panama."¹²⁸ Sofaer concluded that "the cooperation and support of President Endara lends substantial weight to the legitimacy of the U.S. action in Panama."¹²⁹

The facts of the case were, however, that Endara was sworn in at Fort Clayton, a US military base in the Canal Zone, less than an hour before the invasion began, and was not told of the plans for deployment of US forces until troops were already in the air.¹³⁰ These facts seem to weaken the argument that the invasion was pending upon Endara's approval and, in fact, eviscerate that consent of any substantial weight. In other words, the US intended to carry out the invasion with or without Endara's approval. Significantly, the United States never claimed that the invasion was actually requested by Endara.

Even if it is accepted that Endara was consulted prior to the invasion, Endara was not entitled to invite the US troops into the Panamanian territories. As Tom Farer rightly pointed out, "Noriega and his associates were, for the purpose of international law, the legitimate government of

¹²⁷ Ibid. p 289

¹²⁸ Letter from the Permanent Representative of the United States, Thomas Pickering, to the President of the Security Council dated December 20, 1989. *UN Doc. S/21035*

¹²⁹ Sofaer, note 108 *supra*, p 290

¹³⁰ Chesterman, note 14 *supra*, p 104; see also Woodward, B. *The Commanders*, Simon & Schuster, New York, 1991, p 182

Panama.”¹³¹ Sofear disputed this argument, suggesting that the fact “that [Endara] lacked such clear control, however, does not deprive his consent of legal significance.”¹³² Sofear’s argument is groundless. As mentioned above,¹³³ the legitimate government of a given State is the one that enjoys effective control over its territories or the *de facto* government. As David Wippman rightly pointed out, “under a conventional reading of international law, effective control is an essential (perhaps the only) component of a government’s authority to represent a State in international affairs.”¹³⁴ Therefore, one can argue that even if there was consent on the part of Endara and his associates, this approval does not legitimize the invasion.

Furthermore, even after the invasion and the installation of Endara’s government, most States of the region refused to recognize the Endara administration as the legitimate government of Panama and withdrew their ambassadors from Panama.¹³⁵ Also, the Permanent Council of the OAS did not, at first, accept the credentials of the ambassador sent by Endara to represent Panama. Noriega’s ambassador remained and took part in the vote criticizing the invasion. Gradually, however, over a period of several months, most governments came round to recognizing the Endara regime.¹³⁶ The stance of OAS and the Latin American States further supports the argument that Noriega’s government was the legitimate government of Panama and can be seen as an indirect expression of their rejection of the forcible regime change in Panama, notwithstanding the unpopularity of the ousted regime.

The fact that General Noriega had attained his position by the use of force and intimidation, and that his continuation in power was contrary to the expressed will the Panamanian people is well-attested, exactly as was the case of Saddam Hussein in Iraq. This does not, however, constitute a

¹³¹ Farer, note 5 *supra*, p 510

¹³² Sofaer, note 108 *supra*, p 290

¹³³ See section B.2 above

¹³⁴ Wippman, D. “Pro-democratic intervention by Invitation”, in Fox, G & Roth, Brad (ed.), *Democratic Governance and International Law*, Cambridge University Press, 2000, p 309

¹³⁵ Chesterman, note 14 *supra*. p 106

¹³⁶ Farer, note 5 *supra*. p 510

legal basis for unilateral external intervention to replace that rule with a more democratic one. There is no authorization, in any international legal instrument, for intervention to maintain or impose a democratic form of government in another State, and no such widened understanding of Article 2(4) is supported by State practice. Analysis of the Panama case, including the UN, OAS, and the Latin American States' reactions, therefore, confirms and supports the well-established accepted principle of non-intervention and confutes arguments that Panama invasion should be held as a model of a new era of pro-democratic intervention.

C.2 Pro-democratic intervention under the authority of the Security Council

Before examining the cases of Haiti and Sierra Leone—as examples for the Security Council authorization for military actions to restore democracy, it is important to distinguish between a unilateral right of pro-democratic intervention, and situations where the Security Council concludes that disruption to democracy constitutes a threat to international peace and security, in line with Chapter VII of the UN Charter. The fact that the Security Council has authorized action in such circumstances contributes to the notion that democratic governance is coming to be regarded as significant right, but the determination that absence of such governance may be a threat to peace does not mean there is a unilateral right of intervention.

Proponents of a unilateral right of pro-democratic intervention, however, rely on the fact that the Security Council in some circumstances, in recent years, made a determination that disruption to democracy constituted a threat to international peace, to support their argument. They extended this determination to argue that all situations of disruption to democracy constitute a threat to international peace and security and, hence, justify the unilateral use of force to restore democracy, even in the absence of Security Council authorization. It has been argued, also, that the purposes of international law and of the Charter itself cannot always be served solely through

the Security Council and Charter procedures.¹³⁷ Halberstam is one of those who refuse to limit enforcement actions to restore democracy to measures authorized by the Security Council. In her view, the possible risk of abuse brought by permitting unilateral enforcement is offset by the risk of nothing being done, if enforcement measures are limited to those taken under UN auspices. She cites as a case in point the Idi Amin regime in Uganda, where the UN failed to act and eventually Tanzania intervened unilaterally. She went further to argue that “Whatever abuses resulted from unilateral intervention by democracies would pale by comparison to the horrors perpetrated by totalitarian regimes that were permitted to continue in the name of non-intervention.”¹³⁸

Indeed, in some circumstances, the Security Council appeared to be impotent. It is also true that the UN *per se* does not have the capability to stop human rights violations in every spot around the globe. In 1995, in the Supplement to the Agenda for Peace, then Secretary-General Boutros Boutros-Ghali observed: “One of the achievements of the Charter of the United Nations was to empower the Organization to take enforcement action against those responsible for threats to the peace, breaches of the peace or acts of aggression. However, neither the Security Council nor the Secretary-General at present has the capacity to deploy, direct, command and control operations for this purpose, except perhaps on a very limited scale.”¹³⁹ Boutros-Ghali went on to say that “[t]he United Nations does not have or claim a monopoly of any of these instruments. All can be, and most of them have been, employed by regional organizations, by ad hoc groups of States or by individual States ...”¹⁴⁰

¹³⁷ Reisman, “Why Regime Change is (Almost Always) a Bad Idea”, note 3 *supra*, p 521

¹³⁸ Halberstam, note 2 *supra*, p 173

¹³⁹ *Supplement to an Agenda for Peace*, Report of the Secretary-General on the Work of the Organization, January 3, 1995, UN Doc. A/50/60-S/1995/1, para. 77, available at <<http://www.un.org/Docs/SG/agsupp.html>> [Hereinafter Boutros-Ghali statement]

¹⁴⁰ *Ibid*, para 24

The Secretary-General's statement has been understood as encouragement to individual States to replace the UN or to share with it in its responsibilities, because the values of international law and the Charter cannot always be achieved through the UN.¹⁴¹ However, it is suggested this statement was an acknowledgement of the political reality that the UN *per se* does not possess the means to carry out fully its responsibilities and it always relies on powerful States to do so. It can also be inferred that the Secretary-General was urging powerful States and regional organizations to provide more help and assistance for the UN in its operations. However, the statement, at any rate, cannot be interpreted to permit unilateral use of force outside the framework of the Security Council. This understanding is enhanced when reading the remainder of Boutros-Ghali statement: "...or by individual States, but the United Nations has unparalleled experience of them and it is to the United Nations that the international community has turned increasingly since the end of the Cold War. The United Nations system is also better equipped than regional organizations or individual Member States to develop and apply the comprehensive, long-term approach needed to ensure the lasting resolution of conflicts."¹⁴²

It is clear, thus, that the Secretary-General did not intend to encourage unilateral action by individual States, but through the framework of the organization. In fact, unilateral pro-democratic intervention poses a threat to the Article 2(4) ban on the use of force and, hence, to the UN as the body mainly responsible for issues of peace and security in the context of increasingly entwined international relations.¹⁴³ Furthermore, as a political reality, to permit individual use of force for any reason, except in self-defence, is to give a dubious legitimacy to the arbitrary use of force by the only remaining superpower and a few other powerful States.

¹⁴¹ Reisman, "Why Regime Change is (Almost Always) a Bad Idea", note 3 *supra*, p 521

¹⁴² *Boutros-Ghali Statement*, note 139 *supra*, para 24

¹⁴³ Chesterman, note 14 *supra*, p 110

Above all, most States and writers take the stance that the only acceptable form of pro-democratic intervention is pursuant to a Security Council determination that disruption to democracy in a given State constitutes a threat to international peace and security within the meaning of Chapter VII of the UN Charter and subsequent authorization to Member States to intervene to restore democracy. Franck, for example, whilst strongly advocating the peoples' "democratic entitlement," argued that "enforcement measures such as sanction, blockade, or military intervention" to promote the right of self-determination and democratic governance can be permitted "in limited circumstances," and only if authorized by the UN Security Council "not by individual members" of the UN.¹⁴⁴ This section examines two major examples of intervention to restore democracy which have been authorized by the Security Council.

C.2.1 Haiti (1994)

In 1990, following several years of international pressure, internationally monitored democratic elections were held in Haiti, and Jean-Bertrand Aristide was elected President.¹⁴⁵ However, in September of the following year, President Aristide was overthrown by a *coup d'etat*.¹⁴⁶ The Organization of American States (OAS) was quick to condemn the coup and urged that diplomatic and, later, economic sanctions be instituted by its members.¹⁴⁷ The Security Council failed to adopt a resolution on the issue, apparently because of lack support from China and certain non-aligned States, who opposed increased Security Council involvement in areas traditionally considered to fall within the jurisdiction of the individual State.¹⁴⁸ The General

¹⁴⁴ Franck, note 6 *supra*, p 85

¹⁴⁵ On international monitoring of the Haitian election of December 16, 1990, see Fauriol, G. "inventing Democracy: the Elections of 1990", in Fauriol, G. and Oberstar, J. (ed), *The Haitian Challenge: US Policy Considerations*, Centre for Strategic & International Studies, Washington, D.C, 1993, p 57

¹⁴⁶ Wippman, note 134 *supra*, p 301

¹⁴⁷ See MRE/RES.1/91, MRE/RES.2/91 and MRE/RES.3/92 adopted on 3 and 8 October 1991 and 17 May 1992, respectively, by the Ministers for Foreign Affairs of the member countries of the Organization of American States. See also Wippman, D. "Defending Democracy Through Foreign Intervention", 19 *Houston Journal of International Law*, 1997, p 661

¹⁴⁸ Chesterman, note 14 *supra*. p 152

Assembly, by contrast, strongly condemned the “illegal replacement of the constitutional President of Haiti,”¹⁴⁹ affirming that “any entity resulting from that illegal situation”¹⁵⁰ was unacceptable and demanded “the immediate restoration of the legitimate government of President Jean-Bertrand Aristide”¹⁵¹

However, Haiti’s military dictators steadfastly refused to reinstate the Aristide government, and, moreover, kept up its persecution of Aristide’s supporters. This situation prompted the Security Council eventually to adopt Resolution 841 of (1993). In that resolution the Council determined that “the continuation of this situation threatens international peace and security in the region,”¹⁵² and therefore, acting explicitly under Chapter VII, the Council announced a mandatory economic embargo, in June 1993. This action, however, failed to secure Aristide’s reinstatement. On 29 July 1994, nearly three years after his deposition, the Aristide’s government-in-exile formally requested “prompt and decisive action”¹⁵³ by the international community. The Security Council promptly responded, under Chapter VII, by passing Resolution 940 (1994), which “authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement.”¹⁵⁴ Military action, however, was rendered unnecessary by the agreement brokered by the US former President Jimmy Carter with the Haitian military on September 18, 1994, for Aristide’s

¹⁴⁹ General Assemble Resolution 46/7 of 11 October 1991

¹⁵⁰ Ibid

¹⁵¹ Ibid

¹⁵² Security Council Resolution 841 of 16 June, 1993

¹⁵³ Letter dated 29 July 1994 from Aristide Government (in-exile) to the United Nations, *UN Doc. S/1994/905*, annex; see also letter dated 30 July 1994 from the Permanent Representative of Haiti to the UN, *UN Doc. S/1994/910*.

¹⁵⁴ Security Council Resolution 940 of 31 July, 1994

restoration.¹⁵⁵ In general, States reacted favourably, with only a small number voicing serious concerns.¹⁵⁶

The Haiti operation has been seen as the peak of Council activism in the 1990s.¹⁵⁷ Certainly, the authorization of forcible removal of one regime and reinstatement of another was unprecedented. A number of Council resolutions had recognized internal strife as “threats to the peace” warranting a Chapter VII response,¹⁵⁸ but never before could the Council be said to have authorized the use of force in support of democracy. Some commentators, nevertheless, have expressed concern about the legality of the Security Council’s action.¹⁵⁹ They expressed doubt as to the threat to peace posed by events in Haiti, and although the flow of refugees might be considered ground for a determination that a situation threatens international peace and security, this is hardly applicable in the case of Haiti, as relatively few refugees were caused by the conflict compared to the millions displaced by the events in Iraq, Somalia, and Rwanda.¹⁶⁰ In Teson’s words, “no one can seriously argue that the Haitian situation posed a threat to international peace and security in the region.”¹⁶¹ Others considered that the main factor influencing some Council members was the request for assistance from the Aristide government-in-exile.¹⁶² This view finds supporting evidence in the preamble of resolution 841 (1993), where

¹⁵⁵ President Carter Leads Delegation to Negotiate Peace with Haiti, the Carter Center. See in <<http://www.cartercenter.org/news/documents/doc218.html>>

¹⁵⁶ Chesterman, note 14 *supra*, p 155

¹⁵⁷ *Ibid.* p 151

¹⁵⁸ For example, Resolution 221 of 9 April 1966 regarding the situation in Southern Rhodesia, Resolution 418 of 4 November, 1977 concerning the apartheid regime in South Africa and Resolution 688 of 5 April 1991 in the case of Iraq’s dissident minorities. See Chapter 1, section C.1.1

¹⁵⁹ Donoho, D. “Evolution or Expediency: The United Nations Response to the Disruption of Democracy”, 29 *Cornell LJ*, 1996, p359

¹⁶⁰ *Ibid.* p 362-3

¹⁶¹ Teson, F. *Humanitarian Intervention: An Inquiry into Law and Morality*, second edition, Transnational Publishers, New York, 1997, p 254

¹⁶² Donoho, note 159 *supra*. p 347

it is stated explicitly that the mandatory “trade embargo” was linked to the request from “the legitimate government of President Jean-Bertrand Aristide” of Haiti.¹⁶³

Overall, it seems that the unprecedented action by the Security Council marked a new era of support for the legitimacy both of an international principle of democratic rule and of collective humanitarian intervention. This new trend can be seen as an expansion of Council responsibilities based on a new interpretation of the UN Charter. As indicated in Chapter 1,¹⁶⁴ despite the restriction imposed on the UN organs in Article 2(7) not to intervene in internal situations, the Security Council evidently linked international peace and security to internal conditions such as massive violations of human rights and disruption of democracy. Today, it seems acceptable that the Council could have declared the unconstitutional overthrow of an elected government as a threat to international peace and security necessitates its interference. The Council seemingly views its interference in these situations as not to impinge the sovereignty of the State. This new trend was best described by the Secretary-General Javier Perez de Cuellar: “It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity...We need not impale ourselves on the horns of a dilemma between respect for sovereignty and the protection of human rights...What is involved is not the right of intervention but the collective obligation of States to bring relief and redress in human rights emergencies.”¹⁶⁵

¹⁶³ Security Council Resolution 841 of 16 June, 1993

¹⁶⁴ See chapter 1, section C.1.1

¹⁶⁵ Secretary-General of the United Nations Report on the Work of the Organization, *UN Doc. A/46/1*, September 1991, pp. 10-11. This theme was also prominent in an earlier speech, “Secretary-General’s Address at University of Bordeaux,” *UNDPI Press Release*, SG/SM/4560 of April 24, 1991

C.2.2 Sierra Leone 1997

The Security Council's response to Economic Community of West African States' (ECOWAS) intervention in Sierra Leone is another event cited as an example of collective pro-democratic intervention. In February 1996, after a long period of military rule and internal conflict, Ahmed Tejan Kabbah came to power in Sierra Leone, through internationally monitored elections that were generally considered to be free and fair.¹⁶⁶ After little more than a year, however, he was deposed in a coup by the Armed Forces Revolutionary Committee (AFRC). The overthrow of Kabbah's government was widely condemned by the world community and the AFRC failed to win recognition from any government.¹⁶⁷ The Security Council, in a Presidential Statement, "strongly deplore[d] this attempt to overthrow the democratically elected government and call[ed] for an immediate restoration of constitutional order."¹⁶⁸

In June 1997 the Organization of African Unity (OAU) implicitly authorized ECOWAS to take military action to restore the elected government, urging Sierra Leone's neighbours "to take all necessary measures"¹⁶⁹ to return President Kabbah to office. Immediately after the coup, Nigeria reinforced the troops it already had stationed in Sierra Leone under a pre-existing mutual defence treaty and attacked several military targets in Freetown, the capital city, with the aim of intimidating the coup leaders.¹⁷⁰

The Security Council, knowing that the ECOWAS had already authorized (and taken) militarily action against the coup, "strongly supported" the OAU's appeal to ECOWAS to help restore the deposed leader, although it indicated its preference for peaceful measures.¹⁷¹ On October 8, 1997, the Council, acting under Chapter VII, unanimously adopted Resolution 1132, determining

¹⁶⁶ Wippman, D. "Pro-Democratic Intervention by Invitation", note 134 *supra*, p 303

¹⁶⁷ Ibid. p 303-5

¹⁶⁸ Statement by the President of the Security Council on 29 May, 1997, *UN Doc. S/PRST/1997/29*

¹⁶⁹ Decision of the 33rd Summit of the Organization of African Unity on 2 June, 1997

¹⁷⁰ Wippman, D. "Pro-Democratic Intervention by Invitation", note 134 *supra*, p 304

¹⁷¹ Security Council Resolution 1132 of 8 October, 1997

that the “situation in Sierra Leone constitutes a threat to international peace and security in the region”¹⁷² and demanding “that the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected government and a return to constitutional order.”¹⁷³ For that purpose, the Council decided to impose mandatory economic sanctions, to weaken the AFRC by cutting off from foreign supplies of war material.¹⁷⁴ The resolution expressly “authorized ECOWAS, cooperating with the democratically-elected government of Sierra Leone, to ensure strict implementation”¹⁷⁵ of these sanctions. The Council, in reality, was purporting to give retrospective validation to actions that had already occurred. The embargo had been in place since August 1997, and there had been periodic attacks by ECOWAS forces in the ensuing period.¹⁷⁶

After the failure of these diplomatic efforts, in February 1998, Nigerian-led forces mounted a major attack and after a week of intense fighting, captured Freetown. The leaders of the junta fled the country and President Kabbah was reinstated.¹⁷⁷ In after-the-fact authorization (as the Security Council’s mandate only permitted the use of force to ensure the implementation of the economic embargo not to remove the junta),¹⁷⁸ the Security Council welcomed the fact “that the rule of the military junta has been brought to an end...”¹⁷⁹ and “commend[ed] the Economic Community of West African States (ECOWAS) and its Military Observer Group (ECOMOG) ... for the important role they are plying in support of the objectives related to the restoration of peace and security” in Sierra Leone.¹⁸⁰ Although the Council did not explicitly refer to the use of

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ Ibid

¹⁷⁶ Wippman, “Pro-Democratic Intervention by Invitation”, note 134 *supra*, p 305-7

¹⁷⁷ Ibid, p 307

¹⁷⁸ For the theory of post-hoc authorization, see Chapter 4, section C.3.1

¹⁷⁹ Statement by the President of the Security Council on 26 February 1998, *UN Doc. S/PRST/ 1998/5*

¹⁸⁰ Security Council Resolution 1162 of 17 April 1998

force, it seems to have been sufficiently satisfied with the outcome, to accept the means by which it was secured.

The events in Sierra Leone certainly constituted a significant precedent for proponents of pro-democratic intervention. Roth suggested that “[t]he argument can be made, with at least a modicum of plausibility, that coups against elected governments are now, *per se*, violations of international law, and that regional organizations are now licensed to use force to reverse such coups in member States.”¹⁸¹ However, even if the case of Sierra Leone is accepted as to some degree supporting claims of a right of pro-democratic intervention by regional organizations, such a right should be restrictively interpreted and confined to exceptional circumstances. More importantly, it should be born in mind that the military actions taken in the cases of Haiti and Sierra Leone were based first and foremost on determinations made by the Council under Article 39 that the disruption of democracy and the overthrow of the legitimate governments in those countries constituted threats to international peace and security. Thus, the undemocratic governance *per se* was not the main factor that provoked the Council’s authorizations. Even in the case of Haiti, the Council did not rely solely on the request of Aristide’s government-in-exile. In other words, the Council did not consider this request as a sufficient basis to authorize military action.¹⁸² Had the Council considered that Aristide’s request *per se* constituted sufficient legal grounds for authorizing the use of force, it would not have emphasized that the situation in Haiti was “unique” and constituted “a threat to peace and security in the region.”¹⁸³ Similarly, in Sierra Leone, the Council determined that the military coup threatened peace and security in the region and, in particular, expressed concerns regarding “the deteriorating humanitarian conditions in

¹⁸¹ Fox, G and Nolte, G. “Intolerant Democracies”, in Fox, G & Roth, Brad (ed.), note 134 *supra*, p 407

¹⁸² Wippman, “Pro-Democratic Intervention by Invitation”, note 134 *supra*, p 302; see also Wippman, “Defending Democracy Through Foreign Intervention”, note 147 *supra*, p 677

¹⁸³ Security Council Resolution 940 of 31 July, 1994

that country, and the consequences for neighbouring countries.”¹⁸⁴ The South Korea’s Representative gave a remarkable explanation that the “coup had had a destabilizing effect on the whole region by reversing a new wave of democracy which was spreading across the African continent.”¹⁸⁵ Thus, it appears clear that there must be a link between the disruption of democracy in one country and the status of peace in order for the Council to authorize military action. Conversely, there might be a disruption of democracy in one country, which does not reach the threshold of threat to international peace. Certainly, such a determination is exclusively for the Security Council to make.

Section D: Iraq: “the Mother of All Regime Changes”¹⁸⁶

It is a well-documented fact that Saddam Hussein was a brutal dictator who wreaked irreparable damage on Iraqi civil society, destroying independent organizations and breaking the social solidarity among citizens. He remained in power against the clear expression of the will of the Iraqi people by use of force and strong-arm tactics. However, as explained in the previous sections, there is no accepted principle of international law that legitimizes unilateral foreign military interference (without Security Council authorization) to replace his regime by a more democratic government whose methods of operation approximate human rights standards. This section reviews the facts of the Iraqi case and the humanitarian aspects involved.

D.1 Humanitarian objectives as basis for the invasion of Iraq

To recall the facts of the Iraqi case, ever since the end of the first Gulf War in 1991, the U.S. government has focused its attention on Saddam Hussein himself. Both the American and British heads of government were concerned that a large proportion of the world’s oil was in the hands of a volatile, violent dictator pursuing WMD. Initially, they expected that Saddam’s regime

¹⁸⁴ Security Council Resolution 1132 of 8 October, 1997

¹⁸⁵ UN Press Release, SC/6425, 8 October, 1997

¹⁸⁶ Reisman, “Why Regime Change is (Almost Always) a Bad Idea”, note 3 *supra*, p 519

would be toppled by the combination of military defeat and internal unrest.¹⁸⁷ However, Saddam held on to his position and pursued regional domination, the crushing defeat in the first Gulf War notwithstanding. The continuation in power of Saddam Hussein was unacceptable to the US, who saw his removal as vital to US policy concerns in the region and tried by various means to remove Saddam from power.¹⁸⁸ For many years, efforts were pursued to instigate a coup in Baghdad.¹⁸⁹ In addition, among the goals of the US attacks on Iraq after the formal cease-fire in 1991, was to undermine Saddam and to weaken his regime. Washington also hoped that sanctions would trigger unrest among the Iraqis themselves further destabilizing the regime. In particular, efforts were made to strengthen the Iraqi opposition, in order to enhance its potential role as an instrument for the overthrow of Saddam.¹⁹⁰ US support for the Iraqi opposition included assistance to form the Iraqi National Congress (INC) as an umbrella group.¹⁹¹ The US Congress in 1998 passed the “Iraq Liberation Act” authorizing, amongst other aid, the transfer of 97 million Dollars in military equipment to opposition groups.¹⁹²

Regime change in Iraq became a formal stated goal of United States foreign policy when former US President Bill Clinton signed the “Iraq Liberation Act” into law on October 31, 1998. The act declared: “It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime.”¹⁹³ Washington hoped to remove Saddam from power and replace him with the opposition, as President Bill Clinton indicated in November 1998, when he

¹⁸⁷ Byman, D. “After the Storm: U.S. Policy Toward Iraq Since 1991”, 115 *Political Science Quarterly*, 2000-2001, p 497

¹⁸⁸ Byman, D. Pollack, K. and Rose, G. “The Rollback Fantasy”, 78 *Foreign Affairs*, 1999, p 25

¹⁸⁹ Katzman, K. “Report for Congress, Iraq: US Regime Change Efforts and Post-War Governance”, 2003, p 1, available at <<http://fpc.state.gov/documents/organization/19708.pdf>>

¹⁹⁰ Byman, note 187 *supra*, p 497

¹⁹¹ See generally Katzman, K. note 189 *supra*, pp 2-7

¹⁹² Iraq Liberation Act of 1998, sect. 4, Article A(2)(B), available at <<http://www.iraqwatch.org/government/US/Legislation/ILA.htm>>

¹⁹³ Ibid

promised to work for “a new government” in Baghdad.¹⁹⁴ However, these efforts were fruitless. Removing Saddam and the Baath regime from power appeared to be far more difficult than expected and the opposition groups did little to change the regime in Baghdad.

The rationale for the U.S. policy was to avert Iraqi regional aggression towards both the Gulf States and Israel; to remove the threat posed by Iraq’s nuclear, biological, and chemical and missile programmes: and, above all, to preserve stability in the Gulf region which produces and reserves most of the world’s oil.¹⁹⁵ As pointed out by Under Secretary of Defence, Paul Wolfowitz, “Toppling Saddam is the only outcome that can satisfy the vital US interest in a stable and secure Gulf region, because, to a degree unique among contemporary tyrannies, the Iraqi regime is Saddam Hussein.”¹⁹⁶

By the advent of the Bush administration, the US policy makers were committed to forcible removal of Saddam Hussein’s regime in Iraq. This proposal was enhanced further by the atrocities of September 11. Of course, these events provided an excellent opportunity to the Bush administration to publicize that despotic regime in countries such as Afghanistan and Iraq result in producing terrorists who represent a vital danger to the United States citizens and interests. Hence, changing these regimes for democratic governments would reduce, or even eliminate, the danger to the United States. The shift towards a more assertive policy against Saddam Hussein’s regime in Baghdad first became clear in President Bush’ State of the Union message on January 29, 2002, when he characterized Iraq as part of an “axis of evil,” along with Iran, Syria and North Korea.¹⁹⁷ Thus, it could be argued that, similar to Reagan Doctrine, humanitarian grounds

¹⁹⁴ Cited in Byman, note 187 *supra*, p 512, footnote omitted

¹⁹⁵ Ibid. p 495

¹⁹⁶ Wolfowitz, P. “Bring Saddam Down”, *The Ottawa Citizen*, November 25, 1998, Quoted in Mchargue, R. “Neo-conservatism and Iraq”, Florida State University, 2005, p 103, available at <<http://etd.lib.fsu.edu/theses/available/etd-07092005-000303/unrestricted/Binder1.pdf>>

¹⁹⁷ President Bush’ State of the Union message on January 29, 2002, available at <<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>>

and democratization were, in the first place, to serve US vital security and economic interests rather than the people of the targeted country.

This argument may appear as unfair to the US which had expressed concern about the human rights violations in Iraq and backed Security Council Resolution 688, which demanded that Iraq respect the human rights of its communities, and has been enforcing a no-fly zone in northern and southern Iraq in part to protect Iraq's communities. However, in fact, the US administration has never made any explicit formal commitment to either the Kurds or to the Shiites. As Daniel Byman correctly pointed out, "Although the United States and its allies have taken steps to protect Iraqi Shiites and Kurds from the depredations of Saddam's regime, these steps were limited and evince a weak commitment to humanitarian objectives."¹⁹⁸ More importantly, the economic sanction imposed on Iraq by the Security Council following its invasion of Kuwait had a severe humanitarian impact on Iraq's population rather than the regime itself. The oil-for-food programme authorized by Security Council Resolution 986,¹⁹⁹ which allowed Iraq to sell oil to purchase food, medicine, and other exigencies resulted in humanitarian crisis among ordinary Iraqis as the elites of Saddam Hussein's regime has manipulated the programme for their own benefits at the expense of the well-being of the Iraqi population. Surely, most of the blame lies with the Iraqi regime. However, the US support for the sanctions and its constant refusal to alleviate the sanctions in the hope that they would cause unrest among the Iraqis and destabilize the regime, despite its awareness of the humanitarian crisis in Iraq, enhance the argument that the

¹⁹⁸ Byman, note 187 *supra*, p 499

¹⁹⁹ Security Council Resolution 986 of 14 April, 1995

humanitarian aspects were the least of the US concerns.²⁰⁰ As Gause pointed out, “American policymakers need to recognize that the only ‘box’ into which sanctions put Iraqis is coffins.”²⁰¹

The inevitable conclusion reached from reviewing the facts of the matter is that, despite the invocation of human rights abuses as ground for the removal of Saddam, humanitarian objectives were, at best, the least important. The American administration’s view was simply that Saddam Hussein must go, fundamentally for the sake of the American security and economic interests, not to democratize Iraq or liberate its people from the rule of a brutal dictator. In other words, similar to the US actions against its southern neighbours, the removal of Saddam Hussein’s regime had other important priorities rather than establishing democratic governance or liberating the people of those countries from tyrannical rule. Furthermore, despite his well-known despotic rule in Iraq, the US, for a long time, maintained good relations with Saddam Hussein’s government and even supported him in his aggressive war against Iran.²⁰² Ironically, even the same US administration today still maintains good relations with States in the Middle East that make no pretence to be democratic. This double-standard reduces the credibility of the US and weakens the argument that the 2003 invasion was essentially for humanitarian purposes. For these reasons, the action in Iraq does not bear scrutiny as a model of pro-democratic intervention. The claim that it is, takes no account of the history of invasion that has characterized the relationship between the United States and Saddam Hussein’s regime and the major US interests which have guided the action. As for international law on the use of force, Iraq is further evidence that there is no unilateral intervention for merely humanitarian purposes; unilateral intervention essentially involves vital self-interests for the intervening State. Finally, it

²⁰⁰ On the subject of sanctions, see generally Haass, R. *Economic Sanctions and American Diplomacy*, Council on Foreign Relations, New York, 1998; Mueller, J and Mueller, K. “Sanctions of Mass Destruction”, *78 Foreign Affairs*, 1999, p 48-53

²⁰¹ Gause, G. “Getting It Backward on Iraq”, *78 Foreign Affairs*, 1999, p 56

²⁰² See Chapter 2, section B.2

seems that because Washington was aware of the weakness of that argument and that it would not be persuasive for the world community, therefore, it did not rely heavily on humanitarian grounds to justify its action. Even where the United States or the UK had invoked promoting democracy or boosting human rights as a legal ground for the invasion, they did not assert the existence of such established rule in international law.

D.2 Regime change not pro-democratic intervention

It is interesting that the US did not use the language “pro-democratic intervention” or “defend democracy” in Iraq, as President Bush (senior) did in the case of Panama. Instead, the American administration used the term “regime change” in the case of Iraq. This language seems to be carefully chosen. Although there are common policy imperatives underlying the two theories, regime change seems to be a more radical claim than “pro-democratic intervention.” Pro-democratic intervention is a short-term action,²⁰³ confined to restoring the democratically-elected government which has been overthrown by an illegal *coup d’etat*. Once the legitimate government has been reinstated and the usurpers removed, it is no longer justified. Thus, the intervening State does not involve itself in regime construction or nation building; it has only a limited and specified mission aimed at restoring the already existing legitimate government. State practice, as shown in the cases discussed above,²⁰⁴ confirms this approach.

In contrast, regime change is a long-term plan, a future-oriented initiative and a much broader concept. It seems that the regime changer is determined to change the structure and the personnel of the government of the target State,²⁰⁵ whether or not there is a democratically-elected government available or even a coherent internal political process that can produce an effective and acceptable candidate. This, by implication, necessitates that the regime changer meddles in

²⁰³ Reisman, W. “Why Regime Change is (Almost Always) a Bad Idea”, note 3 *supra*, p 517

²⁰⁴ See section C *supra*

²⁰⁵ Reisman, “Why Regime Change is (Almost Always) a Bad Idea”, note 3 *supra*, p 517

the politics of the target State to conduct a regime reconstruction. Therefore, unlike the case of pro-democratic intervention, when the existing regime has been ejected and the territory controlled, the regime changer cannot say “mission accomplished” and fly off. It must supervise a transformation and, to a large extent, be involved in the political process in order to produce an alternative. As a matter of fact, the intervening State always installs a government of its own liking, which promises to serve the interests of the invading State.

While the existence of a popular and legitimate government readily available is not a fundamental factor for the legality of the action, it seems that it is one of the decisive elements for the success of the operation.²⁰⁶ Otherwise, a government created by the regime changer will always be seen by the indigenous population as a puppet of the intervening State, and is unlikely to be accepted by them. This is exemplified by the Israeli invasion of Lebanon in 1982, in an attempt to install Bashir Gemayel in power, whom it expected to be friendly to Israeli interests and possibly dependent. However, only a few days later, Gemayel was killed by a massive bomb and the Israeli plan was destroyed.²⁰⁷ Although it is not confirmed who was behind the assassination, it was certain that Gemayel’s government had no popular support in Lebanon. By contrast, in the case of Panama, aside from its illegality, Guillermo Endara was not a puppet of the U.S., but had been freely elected by the people of Panama. Support for Endara among the Panamanian people was reflected in his lasting in power for about 5 years until May 1994, when Panama held its first effective democratic election, monitored by international observers. Thus, one may conclude that regime change where there is no popular and accepted alternative readily available is far more difficult than in the case of pro-democratic intervention where this condition is met.

²⁰⁶ Ibid, p 524

²⁰⁷ UNYB, 1982, p 428-32

Regarding the case of Iraq, although there was no significant domestic and internal support for Saddam Hussein and the Baath party regime in Iraq, nor there was any popular consent among Iraqis for the opposition. Prior to the invasion, the US had tried to create an acceptable alternative to Saddam Hussein.²⁰⁸ As mentioned above,²⁰⁹ it helped the opposition to create the INC and heavily supported it. However, the opposition groups who formed the INC, although they appeared to be united in the anti-Saddam front, in fact, were internally divided by region, religion, and ethnicity: Massud Barzani's Democratic Party of Kurdistan and Jalal Talabani's Patriotic Union of Kurdistan (PUK), and one Shiite militia operating in the south, the Supreme Assembly of the Islamic Revolution in Iraq. Each group had its own agenda, and all distanced themselves from the INC.²¹⁰ Most importantly, none had any real support among the Iraqi people. As the Middle East Institute's Andrew Parasiliti has rightly observed, "the INC enjoys more support along the Potomac than the Euphrates."²¹¹ In addition, the oppositions did not enjoy support on the regional level. Other Gulf States such as Saudi Arabia and Kuwait feared any possible increase in Shiah influence in Iraq, which might strengthen its ties with Iran and, hence, further destabilize the region. Turkey, too, had concerns that opposition success might strengthen the military capabilities and political aspirations of the region's Kurds.²¹² In this situation, the success of "*Operation Iraqi Freedom*" was rendered enormously difficult to achieve.

D.3 "Operation Iraqi Freedom" under the authority of the Security Council

As illustrated in the preceding section, it is accepted that in exceptional circumstances, where there is broad consensus that some form of enforcement action to support or restore democracy is

²⁰⁸ See generally Katzman, note 189 *supra*

²⁰⁹ Notes 191-2 *supra*

²¹⁰ Byman, D, Pollack, K. and Rose, G. note 188 *supra*, p 30

²¹¹ Quoted in *ibid.* Footnotes omitted

²¹² Byman, note 187 *supra*, p 512-13

required, collective action through the Security Council provides the only appropriate and legal alternative, as in the case of Haiti. Only thereby can assurance be provided that force will be used only in pursuit of promoting human rights and democracy. Accordingly, apart from the other justifications of the war, and as far as humanitarian purposes are concerned, any action to change the regime of Saddam Hussein in Iraq, which was perceived by most of the world community as tyrannical, should have been conducted through a collective action under the authority of the Security Council. This would be the only legal and appropriate alternative.

Professor Reisman, however, has questioned whether the outcome would have been different if the action against Iraq had been an international operation, authorized or even directed by the United Nations, rather than effectively unilateral.²¹³ He argues that “the blue helmet, by itself, provides no protection against individuals and groups who calculate that a UN action is going to oust them from, or severely reduce, their power. There is no reason to assume that those in or entering Iraq who are opposed to the regime change, this mysterious “counter coalition of the willing,” would be acting otherwise than they are now.”²¹⁴ However, although it cannot be guaranteed that the regime change in Iraq would have been dazzlingly successful, it is highly likely that the resistance would have been much lower. The blue helmet is a sign of impartiality and presumably a UN force would be seen by Iraqi people as a helping hand not as an occupation force. Furthermore, the authorization of the Security Council would have imbue given the operation with legality needed to incite other States to provide help and assistance which, in turn, would have helped to bring stability to Iraq and the region.

Setting aside the issues of legal principle in relation to a unilateral right of pro-democratic intervention, the current situation in Iraq is such as to cast doubt on the desirability of any such right. The chaos in Iraq shows that the forcible overthrow of a dictator by foreign troops brings

²¹³ Reisman, “Why Regime Change is (Almost Always) a Bad Idea”, note 3 *supra*, p 522

²¹⁴ *Ibid*

serious problems, since the intervening powers are an always outsiders, part of the problem rather than of its solution. Once the dictator is ousted, army of liberation becomes an army of occupation, and as such, faces resentment and resistance greater than were shown to the overthrown regime itself.²¹⁵ It is suggested, therefore, that the disastrous outcomes of the outside intervention in Iraq are likely to have lasting implications for claims to a right of pro-democratic intervention or regime change. Even if the Iraqi fiasco is eventually satisfactorily resolved, States are unlikely to be willing to embark on further adventures of this kind. Ultimately, therefore, the doctrine claiming a right of unilateral pro-democratic intervention will collapse. In this sense, the Iraqi crisis dilemma will have a positive outcome.

Conclusion

In the legal literature, some commentators argue the existence of a newly emerging 'law' allowing States to take unilateral military measures to overthrow tyrannical regimes in other countries, irrespective of sovereignty. They uphold the US interventions in Grenada, Panama and lately in Iraq as evidences of that new right. They seek to justify such intervention with reference to the UN Charter, claiming that Article 2(4) should be viewed as legitimizing the unilateral use of force to "enhance opportunities for ongoing self-determination."²¹⁶ The main legal ground for this argument is the principle of self-determination and modern international human rights law, in general. Proponents of the alleged new 'law' argue that in modern international human rights law, an essential concern is how to replace regimes that rule by violence, oppression and torture, with those that conform in an acceptable degree with human rights standards.

However, a major obstacle to this approach is that it is so far rejected by the overwhelming majority of States.²¹⁷ Although the United States and perhaps the United Kingdom have shown

²¹⁵ Ibid, p 523

²¹⁶ Reisman, "Coercion and Self-Determination: Construing Charter Article 2 (4)", note 2 *supra*. p 643

²¹⁷ Schachter, "The Legality of Pro-Democratic Invasion", note 5 *supra*, p 649

some inclination to cite upholding or restoring democracy as an argument for intervention, Tanzania made no such claim when it deposed Idi Amin in Uganda in 1979, nor did Vietnam when it deposed the mass murderer Pol Pot in 1978, nor by France when it helped to oust 'Emperor' Bokassa in the Central African Republic in 1979.²¹⁸ Even, in the cases in which the pro-democratic argument was invoked by the United States in support of its operations in Grenada, Nicaragua, and Panama (whether explicitly, or implicitly) the action has been condemned by the international community and—when the issue came before it—by the ICJ.

A basic norm of international law, stated clearly in the United Nations Charter and many other authoritative instruments, is the principle of sovereign equality of States. In essence, sovereignty is the right of each territorial community, irrespective of size, power and internal political structure, to self-government, free from interference by larger or more powerful States. This concept is fundamental to the international legal system, and it is difficult to reconcile the idea with a general legitimization of pro-democratic intervention or regime change. Even more important, is that the right of self-determination, which is the cornerstone of democratic rights, is vested in the people of the country, and only they, not on external power acting without their voluntarily will, should decide their own destiny. For a foreign power to attempt to direct and manipulate the political structure of another State is an arrogant usurpation of the right of self-determination.

This view is simply supported by evidence. The Declaration on Intervention adopted by the General Assembly in 1965 states that "[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."²¹⁹ The Declaration on Friendly Relations, adopted without a vote by the General Assembly in 1970, affirms that

²¹⁸ Chesterman, note 14 *supra*, p 107

²¹⁹ *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* United Nations General Assembly Resolution 2131(XX), 21 December 1965, see also Chapter 1, section A

“every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”²²⁰ General Assembly Resolution 45/150 (1990), adopted by a large majority, recognizes that “the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State’s sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States.”²²¹ Significantly, the ICJ in *Nicaragua* case declared that it “cannot contemplate the creation of a new rule opening up a right of intervention by one state against another on the ground that the latter has opted for some particular ideology or political system.”²²² The court added that while a State might “form its own appraisal of the situation as to respect for human rights”²²³ in another state, “the use of force could not be the appropriate method to monitor or ensure such respect.”²²⁴

Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention were to be justified by mere allegations of human rights abuses or undemocratic governance. Such a doctrine would loosen the regulations of the use of force in international relations and would permit powerful States to use force against any regime that does not hold their ideologies. This certainly would have disastrous outcome. Of course, there is an apparent antinomy caused by two contradictory norms; a fundamental contradiction between the right to self-determination and preserving human rights, on the one hand, and the principles of non-interference in internal affairs, the prohibition of use of force in international relations and State sovereignty, on the other hand. However, it can be argued that this contradiction was

²²⁰ *Declaration on Friendly Relations* adopted in General Assembly Resolution 2625 (XXV) of 24 October 1970, see note 22 *supra*

²²¹ *Enhancing the effectiveness of the principle of periodic and genuine elections*, General Assembly Resolution 45/150 of 18 December 1990

²²² *Nicaragua (Merits)*, ICJ Reports, 1986, p133, para 263

²²³ *Ibid*, p134-5 para 268

²²⁴ *Ibid*

finally resolved by the recent activism of the Security Council. Obviously, State sovereignty prevails in all but the most egregious instances of widespread human rights violations, in which case multilateral action to secure an immediate remedy or even to change a regime—if need be, forcibly—may be taken. Thus, governments are no longer completely shielded by principles of sovereignty and domestic jurisdiction when they engage in egregious violations of human rights or otherwise expose their populations to widespread or systematic abuse. The constraints on forcible means do not demand that a concerned international community sit on its hands in the face of great human suffering, only that its response must be limited to peaceful means; otherwise they can pursue the Security Council to intervene or authorize intervention under the auspice of the UN. It is also disingenuous to cite the US invasions in Grenada, Panama or Iraq as models of new era of pro-democratic intervention. To do so, is to ignore the genuine reasons that motivated these actions.

To conclude, the invasion of Iraq, obviously, cannot be justified on humanitarian grounds or as a war to promote democracy and to liberate Iraqis from the tyrannical rule of Saddam. There is no principle of international law that legitimizes intervention for regime change, even in the interest of democracy. Moreover, apart from the legal question, the chaos in Iraq demonstrates that forcible removal of a dictator, especially in the absence of an acceptable alternative or a coherent internal political process, in fact, causes more harm to those whom the acting State desires to protect.

Conclusion

The purpose of this study was to assess the legality of the use of force against Iraq in 2003 and whether *Operation Iraqi Freedom* can be justified in accordance with the contemporary regulations of the use of force or was consistent with the principles and purposes of the UN Charter in general. Such an assessment necessitated first highlighting the facts and circumstances which leading to the action, including the background of Saddam Hussein's regime in Baghdad.

The UN was established "to save succeeding generations from the scourge of war" and "to maintain international peace and security, to that end: to take effective collective measures for the prevention and removal of threats to peace. In order to achieve this goal, the Charter in Article 2 (4) prohibits all forms of use of force by States. The article appears to set up a model of State behaviour, with an emphasis on peace as the fundamental aim of the UN. Certainly, Iraq under the regime of Saddam Hussein did not fit within this model of State behaviour.

Iraq's record of violence and flouting of international law and Security Council decisions are undisputed. Saddam Hussein was a leader who posed a major threat to international peace and stability. Only one year after coming to power in Iraq, he blatantly violated the prohibition of the use of force under the UN Charter by commencing a large-scale armed attack against neighbouring Iran. Although the Iraqi government attempted to ground its action on the basis of self-defence, Iraq's justifications for the use of force on such large scale do not withstand close scrutiny. Iraq's attack on Iran and its occupation of a large part of Iran's Eastern Provinces was a clear example of a war of aggression motivated by territorial ambitions and Saddam's personal desire to spread his hegemony over the Gulf region. During the eight years of hostilities, it was evidenced that Iraq, in breach of the Geneva Protocols and the rules of *ius in bello*, frequently deployed chemical weapons against Iranian military personnel and civilians. Although Iran reciprocated in using such a prohibited means of warfare towards the end of the war, Iraq was the

first, and for a long time the only belligerent to have recourse to such weapons; therefore, most of the blame for using such weapons was directed at Iraq.

Iraq's culpability was well acknowledged by the world community at the time. In his report to the Security Council, the Secretary-General unequivocally stated that the war was begun in contravention of international law through the illegal use of force and disregard for a State's territorial integrity; Iraq was responsible for the conflict. However, political considerations prevailing at the time, including the Cold War and the deterioration in the standing of the Islamic Republic of Iran in the international community after the Tehran hostages events, were such that Iraq's aggression was never condemned by the Security Council. On the contrary, the majority of the Western powers were clearly biased to the Iraqi side, especially during the Tanker War.

The toleration of Iraq's aggression against Iran by the world major powers and the poor showing of the Security Council seem to have contributed to further aggression by Iraq. In August 1990, only two years after the cease-fire with Iran, Iraq invaded Kuwait and declared its annexation as Iraq's 19th province. Iraq's action was an act of aggression unprecedented in modern history, challenging the global stability of the post-Cold War era and threatening international peace and security in the already turbulent Middle East. It was a further confirmation of the aggressive and hostile attitude of the regime in Baghdad and its ambitions for territorial expansionism, demonstrated beforehand in the case of Iran. This time, however, the reaction of the world community and the Security Council was completely different. From the onset of the crisis, the Security Council took a firm and vigorous stance, marking the revival of the collective security system established by the UN Charter after the end of the Cold War. The unanimity among the five Permanent Members of the Security Council in 1990/1991 enabled the Council to adopt swift and effective measures in face of Iraq's aggression. Immediately after the invasion, the Council activated its powers and authorities under Chapter VII, imposing economic sanctions

and a naval blockade against Iraq. Soon after, when these sanctions appeared to be ineffective to secure Iraq's withdrawal from Kuwait and the use of force was deemed to be necessary, the Council authorized its first ever enforcement action.

There has been intensive debate in the legal literature regarding whether *Operation Desert Storm* was an act of collective self-defence on behalf of the legitimate government of Kuwait under Article 51 or a Security Council enforcement action. The compelling view is that *Operation Desert Storm* was an enforcement action under Chapter VII of the UN Charter. This view is more compatible with language of Article 51 which clearly evinces that the right of self-defence ceases once the Security Council has taken measures necessary to maintain international peace and security. The fact that the original model of enforcement action envisaged by the drafters—that member States, through special agreements, will place military forces at the disposal of the Security Council and that the Council will control and direct these forces through a Military Staff Committee—was not implemented in *Operation Desert Storm* does not undermine this view. Faced with the reality that no special agreements had been concluded, the Council adopted a practical method of achieving international action where collective force is politically or financially feasible, that is, by delegating the mission to member States who are willing to act on its behalf. A careful reading of the provisions of Chapter VII and Article 106 of Chapter XVII demonstrates that the original formula for forcible action, although it was the principal method the drafters had in mind, was not exclusive. The Security Council can legitimately authorize or call upon a particular State or group of States to execute a specific mission.

After the liberation of Kuwait and in the face of Iraq's reckless behaviour and contempt for the international world order, the Security Council imposed disarmament measures on Iraq in order to eliminate its war-making power and, hence, ensure its peaceful intentions in the future. The cease-fire terms applied to Iraq are unprecedented in UN practice and world history; they

demonstrate the extent to which the Security Council, acting under Chapter VII, may intervene in matters traditionally within the exclusive province of national sovereignty. Its ability to do so reflected an unusual degree of agreement within the international community as to the threat posed by Iraq, as well as the outcome of an annihilating military defeat which left Iraq in no position to bargain or resist. From a legal point of view, the Charter has vested the Security Council with wide range of authorities in order to execute the responsibility of maintaining international peace and security. It is certainly within the scope of the Council's authority to impose sanctions such as a disarmament regime on the defeated aggressor, as long as they can be reasonably be said to fall within the broad aim of restoring international peace and security, in accordance with the purposes and principles of the Charter. Indeed, a State with a long history of aggression and a revealed propensity to continue such an attitude in the future could reasonably have some limitations imposed on its capability to use force, in order to modify its behaviour.

Iraq, while accepting the terms and conditions of the cease-fire Resolution 687, protested that the sanctions imposed in this resolution were illegal and unfair. In this connection some concerns have been raised regarding some disarmament measures which seemingly encroach Iraq's right of self-defence; a right which is guaranteed in Article 51 and remains exercisable, however serious Iraq's past violations have been. Examination of the contemporary rules of international law, however, leads to the firm conclusion that, under the current rules of the law of international organizations, Iraq has no right to reject or to defy the disarmament measures, even if they were unconstitutional or *ultra vires*. These measures remain enforceable upon Iraq unless lifted or modified by the Security Council itself. Apart from the law of international organizations, Iraq was actually estopped from protesting the illegality of those decisions or defying their implementation by the operational rule of equitable estoppel. Thus, while the legality of some

disarmament obligations stipulated in Resolution 687 were doubtful, Iraq was legally bound by them.

Nevertheless, Iraq unremittingly disrupted the inspection process and sometimes completely halted all cooperation with the UNSCOM and the IAEA, leading the Council on several occasions to decide that Iraq was in material breach of its obligations and to warn of severe consequences. In fact, throughout the 12 years between 1991 and 2003, Iraq never complied with its obligations without political, diplomatic and, sometimes military pressure. This constant defiance led the Security Council to adopt Resolution 1441 in which it gave Iraq a “final opportunity” to comply immediately and unconditionally with the terms of Resolution 687. Unfortunately, Iraq’s decision-makers did not take this last chance for peaceful disarmament and continued their provocation of the world community. As the Executive Chairman of UNMOVIC stated before the Council less than two months prior to the invasion, Iraq had not come “to genuine acceptance, not even today, of the disarmament which was demanded of it.”¹ It was against this background that the American and British administrations decided to invade Iraq in 2003 in order to enforce the international will and to remove Saddam Hussein, the originator of the Iraqi threats and defiance, and his government.

Three legal grounds were at various times put forward by either the US or the UK for their use of force against Iraq in 2003: i) the Security Council authorization for the use of force; ii) the right of self-defence in pre-emptive action against threats from Iraq; iii) the right of pro-democratic intervention in Iraq in order to relieve the Iraqi people of vast and continuing human rights violations by the despotic regime of Saddam Hussein.

The first legal justification was based on two interrelated Security Council resolutions which were claimed to provide authority to use force against Iraq after the liberation of Kuwait. The

¹ The Executive Chairman of UNMOVIC, Dr. Hans Blix, briefing of the Security Council on 27 January 2003, *available at* <<http://www.unmovic.org>>

first was Resolution 678. It was argued that its mandate still governed the situation and had not been terminated after Iraq had been driven out of Kuwait. Specifically, the argument was based on the language of the resolution which, according to the US and the UK approach, permitted the Council allies to “use all necessary means” not only to oust the Iraqi troops from Kuwait, but also to “restore international peace and security in the area.” The second was Resolution 687, which laid down the conditions of cease-fire between Iraq and the coalition forces. The US and the UK maintained that any violation of these conditions gave the other party the right to resume fighting. These arguments, however, were rejected by some leading States such as China, France and Russia who argued that the mandate for force established by Resolution 678 was extinguished and that any resumption of fighting required a new explicit authorization from the Security Council. This counterargument implies two propositions; first, that the language of Resolution 678 cannot be interpreted to cover the situation after the liberation of Kuwait has been achieved; second, that a material breach by Iraq for its obligations under Resolution 687 did not necessarily “automatically” give rise to the right of the coalition forces to suspend or terminate the cease-fire and resume hostilities without new explicit authorization of use of force by the Council. In fact, these counterarguments are unfounded on any factual or legal grounds but merely on the diplomatic and political interests of those who opposed the action.

If the text of Resolution 678 is interpreted according to the principle of the natural and ordinary meaning, it can be concluded from the words “and to restore international peace and security in the area” that the Council’s intention was broader than merely driving the Iraqi troops out of the Kuwaiti territory and consequently, the mandate of Resolution 678 was not terminated by achieving this goal. The drafters of this resolution were presumably willing to accomplish some other goal or goals alongside the manifest one; hence their adoption of such broad language. Although this additional goal was not specified in the text of Resolution 678, the Council

elucidated its object in the subsequent Resolution 687 when it determined that “international peace and security in the area” would be achieved by disarming Iraq and eliminating its war-making power. Thus, when reading Resolution 678 in light of Resolution 687, according to the systematic rule of interpretation, it becomes clear that the authorization of force can be used to liberate Kuwait “and to restore international peace and security” by enforcing the disarmament regime upon Iraq by forcible means, if necessary. As a result, no fresh authorization was needed. This approach to Resolution 678 is supported by the practice of member States during the period between 1991 and 2003. After the cease-fire the US, the UK and France (until 1996) used force to secure Iraq’s compliance with its disarmament obligations. They also used force to establish enclaves to protect Iraq’s dissenting minorities against the repression of the Saddam Hussein regime. This approach to the mandate of Resolution 678, although rejected by some member States, reaffirmed the understanding that the authorization of force in Resolution 678 had not expired and could be used to force disarmament upon Iraq, especially as these practices were not condemned by the Security Council or the General Assembly of the United Nations. Furthermore, the practice of the Security Council (as a body) in terminating its authorization of force shows that the Council has been consistent in terminating the mandate of force either by expressly declaring the end of the prior authorization or by setting an up-front time limit on the authorization. Since neither of those explicit expressions was articulated regarding Resolution 678, the mandate of that resolution remains valid.

As to the rules governing the armistice agreements in international law, examination of the customary rules on armistice agreements shows that a party to an armistice is entitled to denounce the agreement and resume fighting if the other party has seriously violated the terms of the agreement. Although some scholars suggest that this rule has been affected by the law of the UN Charter and that a party to UN-sponsored cease-fire is not allowed to resume hostilities on

the grounds of a violation by the other party, this view is unrealistic and contrary to State practice. Furthermore, the weight and legal authority of the documents on which this view rests cannot be taken to replace a well-established customary rule. Thus, it could be concluded that the customary rule regarding the violation of an armistice agreement remains unchanged and still governs international conflicts. This rule is enhanced further by Article 60 of the Vienna Convention on the Law of Treaties, which is also applicable to cease-fire agreements.

In the present case, Resolution 687 clearly linked the cease-fire between the coalition forces and Iraq to the later “unconditional acceptance” of two vital terms: that Iraq eliminates weapons of mass destruction and that it allows verification by a Special Commission. This link between the cease-fire and Iraq’s compliance with the terms and conditions of Resolution 687 was confirmed in many Security Council Resolutions and statements by UN officials. The fact of the matter, however, is that Iraq was unremittingly in violation for its disarmament obligations established in Resolution 687. Therefore, a strong argument can be made that the finding that Iraq was in material breach of its obligation under the cease-fire agreement (Resolution 687) gave rise to the right of the coalition forces to suspend or terminate the cease-fire and resume hostilities without new authorization of use of force.

Regarding the second proposed legal ground for the 2003 action, the claim that the use of force against Iraq was based on the right of self-defence seems to be the least satisfactory justification for the invasion. Indeed, this claim was not only invalid as a legal basis for the action but also undesirable as it intensified the rejection of the action among States and writers, for fear of a possible development of a new doctrine on preventive self-defence, which could be used to justify virtually any use of force.

The UN Charter is explicit in its aim of bringing in a new global era in which State’s recourse to force as an instrument of State’s policy is abolished, in favour of a system of collective security.

Therefore, as mentioned above, the Charter in Article 2(4) prohibited all forms of unilateral use of force. The only exception to this general ban is the right of individual or collective self-defence enunciated in Article 51. Even that right has been regulated under the Charter system. Article 51 permits a State to use force to defend itself if it is subjected to an armed attack (not any act of aggression short of an armed attack) and only until the Security Council has taken “measures necessary” to maintain international peace and security. Since the creation of the Charter, the most divisive question on the subject of self-defence is whether anticipatory self-defence is permitted under Article 51. While some States and writers took the view that self-defence is only permitted after the occurrence of an armed attack in conformity with the exact text of Article 51, others argued that self-defence is also allowed in case of imminent danger and a State does not have to suffer an attack before it can defend itself. A strong argument, however, can be made in support of the latter view. Indeed, the *travaux préparatoires* of Article 51 suggest that the intention of the drafters was to preserve the right of self-defence intact as it was before the adoption of the Charter, including the right of anticipatory self defence. This view finds support in States’ views and reactions expressed in situations where force has been used preemptively (whether the acting State explicitly invoked this right or the action was widely perceived as anticipatory self-defence.) However, the essential and inescapable condition for exercising this right is that the danger must be imminent, such that it can be identified credibly with a high degree of certainty and the State claiming self-defence has no time to seek any other alternative.

The right of anticipatory self-defence has acquired further prominence in relation to the issue of terrorism. Some States, chiefly the US and Israel, have adopted the view that anticipatory self-defence against terrorism and States that support and harbour terrorists, to deter the occurrence of similar attacks in the future, is permissible under the UN Charter. Prior to the September 11

attacks on Washington and New York, this view was contentious. For most States and commentators, the concept of self-defence against non-State actors was problematic. There was little overt support for a right to use force against a State where the terrorists operated or were present, unless the State was clearly complicit in the terrorist acts. In this connection it has been argued that the use of force in response to past attacks seems more like punitive than defensive action, because the harm is already done; consequently, such an action is prohibited under the UN Charter as the Charter absolutely prohibits armed reprisals. These controversial issues, however, came to end after the events of September 11.

The 9/11 attacks and their aftermath have brought a fundamental reappraisal of the legal rules governing the use of force in self-defence, and broken new ground in the international law as to the use of force against terrorism. The almost unanimous support by the world community for a US right of self-defence against those responsible for these atrocities, coupled with the Security Council's new legislation on terrorism, have broadened the right of self-defence to include non-State actors and States that support or harbour terrorists. Indeed, this reaction indicates that the overwhelming majority of the world States today believes that military action against terrorists and States that support and harbour them is permissible. In other words, this consensus is "weighted with the terminology of opinion juris" and "deliberately norm creating." Nevertheless, despite it is admitted that the events of 9/11 and their aftermath may have brought about an expansion of the scope of the right of self-defence to include terrorists and States that support and harbour them, there are many problems associated with this new extension. The exact scope and pre-conditions for exercising this right are still vague. Therefore, the example of the case of 9/11 and the war on Afghanistan should be narrowly interpreted. The world States' reactions to the cases in the post-9/11 period indicate that they accept the application of this new right only under certain conditions, essentially, when a large-scale terrorist attack of substantial effect has

taken place and where there is tangible evidence of the likelihood of further attacks from the same source at some unspecified time in the future. In addition, the State target for the defensive measures should have an obvious link with the terrorist group and not be merely a third State. In relation to the present case, the events of 9/11 had a substantial impact on the situation in Iraq. After the beginning of *Operation Enduring Freedom*, in 2002, the USA adopted a new National Security Strategy. The Strategy included a doctrine of preventive self-defence, indicating that force may be used even where there is no actual or even imminent attack. The US claimed that in light of the new circumstances, the condition of 'imminence' should be interpreted to mean the elimination of the "emerging threats before they are fully formed." Thus, the US administration appears to extend the much-debated doctrine of anticipatory self-defence, to encompass the preclusion of any potential danger, even if the threats are uncertain and unidentified. Furthermore, in an obvious exploitation of the rhetoric of the 'war against terrorism' and the legitimacy conferred on it by the world community and the Security Council, the US administration extended the scope of its new Strategy beyond the original goal of combating terrorism to include States that possess or develop weapons of mass destruction. It is clear that the US has invented such a linkage to bring Iraq and other countries whom it perceives as growing enemies within the scope of its military operations.

This concept of preventive self-defence (known as the Bush Doctrine), however, cannot be contained within the boundaries of self-defence under the UN Charter. It is a dangerous notion, virtually unfettered of any limitations and, for that reason, had previously been overwhelmingly condemned by the world community in the case of the Israeli attack of the Iraqi nuclear reactor in 1981. Indeed, in the absence of actual attack or an identified imminent attack, the use of force cannot be described as defensive. Rather, it is an offensive policy based on extrapolation for the future. In sum, the Bush Doctrine goes far beyond the limits of any theory of self-defence,

including the concept of preemptive itself; therefore, any application of this doctrine will certainly be viewed as illegal.

Despite this apparent illegality of the Bush Doctrine, the US administration attempted to rely on it to justify the use of force against Iraq in 2003. It claimed that it had the right to use force preemptively against threats posed by the Iraqi regime. These threats, claimed the USA, were twofold: (i) the threat of Iraqi links with terrorism; (ii) the threats likely to emerge in the future as a result of Iraq's possession of weapons of mass destruction. However, no evidence has been disclosed to support these claims. On the contrary, the factual circumstances at the time of the invasion refute this line of argument. Therefore, the invasion of Iraq cannot be legally grounded on any theory of self-defence. To do so, is to confer the legality upon the Bush Doctrine and, hence, to develop a doctrine that would grant every nation an unfettered right of prevention against its own definition of threats to its security.²

As to the third justification put forward for the invasion, which is to relieve the Iraqi people of vast and continuing human rights violations by the despotic regime of Saddam Hussein, despite the morality of such a claim, it too cannot fit within the Charter paradigm for the use of force.

A few commentators have asserted the existence of a newly emerging 'law' allowing States to take unilateral military measures to overthrow tyrannical regimes in other countries, irrespective of sovereignty. They seek to justify such intervention with reference to the UN Charter, claiming that Article 2(4) should be viewed as legitimizing the unilateral use of force to "enhance opportunities for ongoing self-determination."³ The main legal ground for this argument is the principle of self-determination and modern international human rights law which has been claimed to provide authority for replacing regimes that rule by violence, oppression and torture,

² Kissinger, H. "Consult and Control: Bywords for Battling the New Enemy", *Washington Post*, 16 September 2002

³ Reisman, "Coercion and Self-Determination: Construing Charter Article 2 (4)", 78 *AJIL*, p 643

with those that conform in an acceptable degree with human rights standards. Finally, proponents of this view uphold the US interventions in Grenada and Panama as evidences of that new 'right'.

The major obstacle to this approach, however, is that it is so far rejected by the overwhelming majority of States.⁴ Although the United States and perhaps the United Kingdom have shown some inclination to cite upholding or restoring democracy as an argument for intervention, Tanzania made no such claim when it deposed Idi Amin in Uganda in 1979, nor did Vietnam when it deposed the mass murderer Pol Pot in 1978, nor France when it helped to oust 'Emperor' Bokassa in the Central African Republic in 1979.⁵ Even, in the cases in which the pro-democratic argument was invoked by the United States in support of its operations in Grenada, Nicaragua, and Panama (whether explicitly, or implicitly) the action was condemned by the international community and—when the issue came before it—by the ICJ. Indeed, the basic norm of international law, stated clearly in the Charter and many other authoritative instruments, is the principle of sovereign equality of States. In essence, sovereignty is the right of each territorial community, irrespective of size, power and internal political structure, to self-government, free from interference by larger or more powerful States. This concept is fundamental to the international legal system, and it is difficult to reconcile with a general legitimization of pro-democratic intervention or regime change. Even more important, is that the right of self-determination, which is the cornerstone of democratic rights, is vested in the people of the country, and only they, not on external power acting without their will, should decide their own destiny. For a foreign power to attempt to direct and manipulate the political structure of another State is an arrogant usurpation of the right of self-determination. This view is amply

⁴ Schachter, "The Legality of Pro-Democratic Invasion", 78 *AJIL*, 1984, p 649

⁵ Chesterman, S. *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford University Press, 2001, p 107

supported by a wealth of evidence, including Declarations and Resolutions by the General Assembly and international jurisprudences. Certainly, it is difficult to see what would remain of the principle of non-intervention in international law if intervention were to be justified by mere allegations of human rights abuses or undemocratic governance. Such a doctrine would loosen the regulation of the use of force in international relations and would permit powerful States to use force against any regime that does not share their ideology. This undoubtedly would have disastrous outcomes.

The invasion of Iraq, therefore, cannot be justified on humanitarian grounds or as a war to promote democracy and to liberate Iraqis from the tyrannical rule of Saddam. There is no accepted principle of international law that legitimizes intervention for regime change, even in the interest of democracy. In addition, as the merits of the Iraqi case show, throughout the years from 1991 to 2003, the US has shown little interest in regard to the humanitarian conditions of the Iraqi people. The inevitable conclusion to be reached from reviewing the facts of the matter is that, despite the invocation of human rights abuses as grounds for the removal of Saddam, humanitarian objectives were, at best, the least important. Similar to the US actions against its southern neighbours, the removal of Saddam Hussein's regime had other important priorities rather than establishing democratic governance or liberating the people of those countries from tyrannical rule. Therefore, it is disingenuous to claim that the invasion was undertaken for humanitarian purposes or to characterize it as a pro-democratic intervention. To do so, is to ignore the real reasons that motivated the action.

To conclude, assessment of the three justifications advanced by the US and UK for the use of force against Iraq in 2003 in accordance with the regulations on the use of force under the UN Charter and customary international law reveals that the only valid legal ground to justify this

action is the authority provided by the Security Council Resolutions 678 and 687. The other two grounds are untenable and cannot justify such an action under the Charter system.

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